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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN RE: VOLKSWAGEN ‘CLEAN DIESEL’  
MARKETING, SALES PRACTICES, AND  
PRODUCTS LIABILITY LITIGATION

This document relates to:

*Nemet, et al. v. Volkswagen Group of America, Inc., et al.*, Case No. 3:17-cv-04372-CRB

No. 02672-CRB (JSC)

**PLAINTIFFS’ MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO VOLKSWAGEN  
U.S. DEFENDANTS’ MOTION TO  
DISMISS THE PRE-NOV  
PLAINTIFFS’ COMPLAINT**

Hearing Date: TBD  
Time: TBD  
Courtroom: 6  
The Honorable Charles R. Breyer

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## I. ISSUES TO BE DECIDED

1. Injury-in-fact that is both concrete and particularized—meaning that Plaintiffs must have an injury that is both existing in fact and affects them personally—satisfies Article III. The named Plaintiffs each suffered an economic loss when they overpaid for their Vehicles based on VW’s misrepresentation and omission of material facts. The Complaint specifies the loss in several ways, including allegations that the moment Plaintiffs paid for their new Vehicles, they suffered an immediate depreciation in value, part of which was due to the “clean-diesel” premium they paid. The Complaint alleges Plaintiffs could not recoup a material portion of that premium, even though a subsequent sale, and that lease payments were inflated and such inflated payments were not recouped on lease termination, and these allegations control. Do Plaintiffs have standing?
2. Plaintiffs agree to dismissal of the Magnuson-Moss Warranty Act claim.
3. Section 209 of the Clean Air Act states that “[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles.” Plaintiffs’ claims based on Defendants’ misrepresentations and omissions regarding their “clean-diesel” Vehicles do not rely on, and are independent of, EPA emissions standards. In other words, the Clean Air Act does not give VW a license to lie to consumers. Has VW failed to meet its burden on the affirmative defense that the CAA preempts Plaintiffs’ claims?
4. Plaintiffs allege with specificity and Defendants have conceded in guilty pleas that Defendants fraudulently failed to disclose material information concerning their purportedly “clean” diesel vehicles; the limitations periods on their claims are tolled under *American Pipe*; and state-law bars on class actions and pre-suit requirements are unenforceable, *see Shady Grove*. Has VW failed to meet its burden of articulating why Plaintiffs’ claims under broadly worded state consumer protection laws are insufficiently pled?

## II. SUMMARY OF THE ARGUMENT

Plaintiffs have Article III standing, which requires, at the pleadings stage, that they have suffered an “injury-in-fact” that is causally connected to Defendants’ conduct. Where “[p]laintiffs contend that class members paid more for [a product] than they otherwise would have paid, or bought it when they otherwise would not have done so, they have suffered an Article III injury in fact.” *Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1104 n.3 (9th Cir. 2013), *as amended on denial of reh’g and reh’g en banc* (July 8, 2013)<sup>1</sup>. Here, Plaintiffs allege that they and other Class members paid a “clean-diesel premium” on the basis of VW’s false promises that their Vehicles were environmentally friendly and met all applicable emissions standards. Plaintiffs would not have paid

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<sup>1</sup> All internal marks and citations omitted unless otherwise noted.

1 that premium but for VW's misrepresentations and omissions—indeed, they could not have legally  
 2 purchased the Vehicles but for VW's fraud. This is a “quintessential injury-in-fact” under the law of  
 3 this Circuit. *Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011).

4 Employing a tactic already rejected by this Court in its *Napleton* decision, VW relies on “no-  
 5 injury product liability” cases to argue that Plaintiffs fail to allege an injury-in-fact because VW's  
 6 Vehicles “never malfunction[ed]” and no “defect []ever manifest[ed].” VW Br. at 21. As this Court  
 7 has already recognized, however, the “defect” alleged here clearly “manifested”—indeed, “the defeat  
 8 device . . . made the vehicles unsaleable.” *In re Volkswagen “Clean Diesel” Mktg., Sales Practices,*  
 9 & Prods. Liab. Litig.

10 , 2017 WL 4890594, at \*3 (N.D. Cal. Oct. 30, 2017) (“*Napleton*”). In addition,  
 11 many of the cases relied on by VW can be distinguished on the basis that they did not involve any  
 12 misrepresentations by the defendants, but merely alleged that the products were devalued by a latent  
 13 defect.

14 VW goes on to claim that Plaintiffs have suffered no injury-in-fact because they fully  
 15 recouped their losses in subsequent sales, but this argument ignores the Complaint's allegations that  
 16 Plaintiffs and Class members *could not* recoup the full amount of the clean-diesel premium they  
 17 paid—some amount of which was necessarily consumed by depreciation, including the depreciation  
 18 suffered by all new vehicles immediately upon sale. Nor does VW's argument acknowledge that  
 19 lessees did not “sell” and thus could not have recouped any amount of their inflated lease payment  
 through a lease termination.

20 Plaintiffs have also sufficiently alleged the second element of Article III standing—that their  
 21 injuries-in-fact were “fairly traceable” to Defendants' conduct—a requirement that is “relatively  
 22 modest,” *Phillips v. Apple Inc.*, 2016 WL 5846992, at \*8 (N.D. Cal. Oct. 6, 2016), and is satisfied  
 23 where plaintiffs allege they “would not have purchased” something but for the defendants'  
 24 misrepresentations or omissions, *Maya v. Centex Corp.*, 658 F.3d at 1070. Here, Plaintiffs allege that  
 25 they and Class members would not have purchased or leased their Vehicles but for VW's  
 26 misrepresentations and omissions regarding the cheat device and the Vehicles' purported  
 27 environmental performance, and that those misrepresentations were “material” both to consumers  
 28 and to regulators. These allegations are more than sufficient to establish that their injuries are “fairly

1 traceable” to Defendants’ conduct. VW tries to muddy the waters by arguing that Plaintiffs do not  
 2 allege that the defeat device “caused” (1) the clean-diesel premium, (2) Plaintiffs’ Vehicles to  
 3 depreciate, or (3) Plaintiffs to incur finance charges. But all these arguments evidence a fundamental  
 4 misunderstanding of the relevant causal connection, which is not between the *defeat devices* and  
 5 elements of Plaintiffs’ injuries, but between *Defendants’ misrepresentations and omissions* and  
 6 Plaintiffs’ injuries. The latter connection is clearly alleged in the Complaint.

7 Like its attack on Plaintiffs’ Article III standing, VW’s preemption argument also fails. VW  
 8 bears the burden on its affirmative defense that the Clean Air Act (“CAA”) preempts Plaintiffs’  
 9 claims, but its express preemption argument rests on fundamental misinterpretations of Section 209  
 10 of the CAA, which preempts claims only where a “*State or any political subdivision thereof*” is  
 11 attempting to enforce a “standard relating to the control of emissions from new motor vehicles,” 42  
 12 U.S.C. § 7543(a) (emphasis added)—not, as here, where private individuals bring fraud-based  
 13 claims. VW relies on *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), to suggest that the  
 14 words “relating to” in Section 209 evince a broad preemptive purpose, but that case has been  
 15 distinguished in similar cases to the present, with the Ninth Circuit rejecting such a broad reading.  
 16 *Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control Dist.*, 644 F.3d 934 (9th  
 17 Cir. 2011). Nor does VW’s implied preemption argument fare better, since Congress did not intend  
 18 to occupy the entire field of motor vehicle regulation, and in any case, there is no conflict between  
 19 VW’s ability to comply with EPA requirements under the CAA and its ability to simultaneously not  
 20 misrepresent having done so.

21 Finally, the Court should not consider any of VW’s arguments for dismissing Plaintiffs’ state-  
 22 law claims; these arguments are cursory to the point of being unintelligible and rely on its 16-page  
 23 Appendix, which lists cases with virtually no discussion and flouts the Court’s page limits. *See*  
 24 *Jonna Corp. v. City of Sunnyvale, Cal.*, 2017 WL 2617983, at \*2 n.4 (N.D. Cal. June 16, 2017)  
 25 (striking appendix “as argument in excess of the page limit”). In any case, VW’s arguments are  
 26 incorrect, since the Complaint adequately alleges damages, proximate cause, and reliance. *See, e.g.*,  
 27 *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015) (plaintiff need only prove that  
 28 omission “was a substantial factor in his decision,” which may be done “by simply proving that, had

the omitted information been disclosed, one would have been aware of it and behaved differently”); *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 985-86 (9th Cir. 2015) (claim under California UCL or FAL requires only “that members of the public are likely to be deceived,” and “does not require individualized proof of deception, reliance, and injury”). Nor are any of Plaintiffs’ claims time-barred, *see Resh v. China Agritech, Inc.*, 857 F.3d 994, 1004 (9th Cir. 2017) (“permitting future class action named plaintiffs, who were unnamed class members in previously uncertified classes, to avail themselves of *American Pipe* tolling would advance the policy objectives that led the Supreme Court to permit tolling in the first place”), deficient with respect to their class allegations, *see Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010) (state prohibition on class actions not enforceable in federal court), or otherwise inappropriately brought due to pre-suit notice or standing requirements.

### III. BACKGROUND

On September 18, 2015, the U.S. Environmental Protection Agency announced findings that Volkswagen had installed software on diesel cars that enabled them to cheat on emissions tests. Complaint ¶ 2.<sup>2</sup> These so-called “defeat devices” reduced nitrogen oxide emissions when the cars were placed on a test machine but allowed higher emissions and improved engine performance during normal driving. *Id.* The devices were installed on more than half a million diesel vehicles in the U.S., *id.*, which VW marketed as “clean” diesel vehicles in an extensive advertising campaign that touted the Vehicles as at once environmentally friendly, fuel efficient, and powerful. ¶¶ 282-317. The campaign proved highly successful, resulting in skyrocketing sales and allowing VW to charge consumers a significant premium for its “clean diesel” vehicles. *E.g.*, ¶¶ 318-321.

When Defendants' emissions cheat was exposed, consumers filed hundreds of lawsuits, most of which have been coordinated in this federal Multi-District Litigation entitled *In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, MDL No. 2672.<sup>3</sup> There have been three resulting consumer class action settlements. The first settlement involved affected 2.0-liter models and was given final approval on October 25, 2016. MDL Dkt. 2102 ("2.0L

<sup>2</sup> All “¶” references are to the Class Action Complaint, Dkt. 7, unless otherwise noted.

<sup>3</sup> References to “MDL Dkt.” refer to this MDL litigation.

1 Order"). The second settlement involved 3.0 liter models and was given final approval on May 17,  
 2 2017. MDL Dkt. 3229 ("3.0L Order"). The third settlement resolved all claims for 2.0 and 3.0  
 3 vehicles against Robert Bosch GmbH and Robert Bosch LLC (together "Bosch"). Settlement and  
 4 Release, MDL Dkt. 2837. This settlement cross-referenced the 2.0L and 3.0L class definitions in  
 5 order to delineate the class with whom Bosch settled all claims. *Id.* § 2.15. This settlement was given  
 6 final approval on May 17, 2017. MDL Dkt. 3230 ("Bosch Smt. Order"). Collectively, the 2.0L, 3.0L,  
 7 and Bosch Settlements are referred to as the "Consumer Settlements."

8 The Consolidated Consumer Class Action Complaint in the MDL originally defined the  
 9 consumer class as "All persons and entities in the United States who purchased or leased a Class  
 10 Vehicle." MDL Dkt. 1230 at ¶ 349. Nonetheless, all three Consumer Settlements proceeded to  
 11 exclude consumers who purchased or leased those same Vehicles, but who no longer owned the  
 12 Vehicles (or whose leases had ended) on September 18, 2015—the date on which the public learned  
 13 about VW's emissions cheat device scheme. Plaintiffs brought the present action on August 2, 2017,  
 14 on behalf of those excluded consumers. Dkt. 7.

15 Although none of this Court's orders finally approving the Consumer Settlements made any  
 16 findings as to the underlying merits of the plaintiffs' claims, the Court held in both its 2.0L Order  
 17 and its 3.0L Order that the strength of the consumers' case weighed against approving the  
 18 settlements—noting the fact that "liability [was] not at issue" since "Volkswagen admits to installing  
 19 and failing to disclose the defeat device in its TDI diesel engine vehicles, which it marketed as  
 20 environmentally friendly." 3.0L Order at 22; *see also* 2.0L Order at 16.

21 While this MDL action progressed, parallel state court actions were also ongoing, including a  
 22 consolidated action in Virginia, in which VW attempted to make similar arguments to those raised in  
 23 its present Motion to Dismiss. *See In re Volkswagen "Clean Diesel" Litig.*, 2016 WL 5347198 (Va.  
 24 Cir. Ct. Aug. 30, 2016) ("Virginia Clean Diesel Action"). The Virginia court rejected VW's  
 25 argument that federal law preempted consumer plaintiffs' claims under Virginia's Consumer  
 26 Protection Act ("VCPA"), and likewise rejected VW's attempts to dismiss the plaintiffs' claims for  
 27 failure to sufficiently allege their claims under the VCPA. *Id.* at \*2-11.

In addition to lawsuits brought by consumers, Defendants faced actions brought by Volkswagen-branded franchise dealerships. Although VW settled those actions, MDL Dkt. 2807, Bosch continued to litigate the claims, filing a motion to dismiss the dealers' RICO claims that was ultimately denied by this Court. MDL Dkt. 4185 ("*Napleton*"). In its Motion to Dismiss, Bosch acknowledges that this Court's opinion in *Napleton* effectively disposes of its arguments that Plaintiffs have failed to plausibly allege a RICO claim against Bosch, but proceeds to make the same arguments in order "to preserve the issues in the event of appellate review." Bosch Br. at 19.

## IV. ARGUMENT

#### **A. Plaintiffs have Article III standing.**

The Volkswagen Defendants (“VW”)<sup>4</sup> incorrectly assert that Plaintiffs lack Article III standing.<sup>5</sup> To establish Article III standing, Plaintiffs must show (1) that they have suffered an “injury in fact” that is “concrete and particularized” and “actual or imminent”; (2) a causal connection between the injury and the Defendants’ conduct; and (3) that it is likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss[, courts] presume that general allegations embrace those specific facts that are necessary to support the claim.” *Id.* at 561.

Plaintiffs have standing by alleging that they were injured by paying a premium for something they did not receive—a “quintessential injury-in-fact” under Ninth Circuit precedent—and that they would not have paid that premium (or purchased the Vehicles at all) but for VW’s fraud. Indeed, the Complaint alleges that Plaintiffs *could* not have purchased the Vehicles but for VW’s fraud, since the Vehicles were illegal to sell.

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<sup>4</sup> For convenience, “VW” in this Opposition refers to both Volkswagen U.S. and Volkswagen AG, although Plaintiffs acknowledge that only Volkswagen U.S. brought the present Motion to Dismiss.

<sup>5</sup> Volkswagen U.S. Defendants' Notice of Motion and Motion to Dismiss the Pre-NOV Plaintiffs' Complaint; Memorandum of Points and Authorities in Support Thereof, Dkt. 4534 ("VW Br.") at 15-30.

1           VW relies on inapposite “no-injury product liability” cases<sup>6</sup> to suggest that Plaintiffs must  
 2 plead “something more” than a possible defect to establish standing;<sup>7</sup> speculates implausibly that  
 3 Plaintiffs somehow recouped the entire premium they paid at resale; suggests that Plaintiffs’ injuries  
 4 are somehow too subjective or generalized to establish standing; and argues that Plaintiffs have  
 5 failed to allege facts to support that their injuries were “fairly traceable” to VW’s actions. Each of  
 6 VW’s arguments disintegrates in the face of Plaintiffs’ specific allegations and clear precedent.

7           **1. Plaintiffs alleged an “injury in fact.”**

8           As VW’s own authority explains, “injury in fact is not Mount Everest.” *Hubert v. Gen.*  
 9 *Nutrition Corp.*, 2017 WL 3971912, at \*9 (W.D. Pa. Sept. 8, 2017) (quoting *Danvers Motor Co. v.*  
 10 *Ford Motor Co.*, 432 F.3d 286, 294 (3d Cir. 2005)). Indeed, “courts have recognized that the ‘injury  
 11 in fact’ requirement is not a substantial hurdle and that a minimal, ‘identifiable trifle’ of injury is  
 12 sufficient.” *Labriola v. Bank of Am., N.A.*, 2012 WL 1657191, at \*6 (N.D. Cal. May 10, 2012)  
 13 (quoting *Preminger v. Peake*, 552 F.3d 757, 763 (9th Cir. 2008)). Here, under clear Ninth Circuit  
 14 precedent, Plaintiffs have met that minimal hurdle.

15           VW argues that Plaintiffs fail to allege a sufficient injury-in-fact, but relies primarily on “no-  
 16 injury product liability” cases in which courts found that plaintiffs had either (i) failed to allege a  
 17 defect, and/or (ii) failed to allege that such a defect had materialized, in the products at issue. *See*  
 18 *generally*, VW Br. at 19-23. Such cases are inapplicable here, for the reasons explained below. Nor  
 19 does VW fare better with its unsupported factual speculation that Plaintiffs suffered no injury  
 20 because they somehow recouped 100% of their losses through resale, *see id.* at 16-17, 24, 26, 27, or  
 21 that Plaintiffs’ injuries are too “generalized,” “subjective,” or “hypothetical” to be cognizable for  
 22 standing purposes, *see generally id.* at 15-16.

23  
 24  
 25  
 26           <sup>6</sup> *See, e.g., In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod.*  
 27 *Liab. Litig.*, 754 F. Supp. 2d 1145, 1164 (C.D. Cal. 2010) (“Toyota Acceleration Litig.”) (describing  
 and distinguishing “no-injury product liability” cases).

28           <sup>7</sup> *See generally*, VW Br. 19-23.

- a. Plaintiffs' allegations that they paid a premium for something they didn't receive establish **injury-in-fact**.

The Ninth Circuit has held that where “[p]laintiffs contend that class members paid more for [a product] than they otherwise would have paid, or bought it when they otherwise would not have done so, they have suffered an Article III injury in fact.” *Hinojos v. Kohl’s Corp.*, 718 F.3d at 1104 (quoting *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012)). Indeed, in this Circuit it is a “quintessential injury-in-fact” when plaintiffs allege that they “spent money that, absent defendants’ actions, they would not have spent.” *Maya v. Centex Corp.*, 658 F.3d at 1069; *see also Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015); *Johnson v. Triple Leaf Tea Inc.*, 2014 WL 4744558, at \*2 (N.D. Cal. Sept. 23, 2014); *In re Vizio, Inc., Consumer Privacy Litig.*, 238 F. Supp. 3d 1204, 1217 (C.D. Cal. 2017).

Courts routinely reject standing challenges where consumers allege a misrepresentation of a product caused them to purchase a product they would not otherwise have purchased. *See, e.g., Hinojos*, 718 F.3d at 1107 (standing found where defendant “made material representation[s] that induced” a purchase); *Morgan v. Wallaby Yogurt Co., Inc.*, 2013 WL 5514563, at \*3-4 (N.D. Cal. Oct. 4, 2013) (standing found where Plaintiffs alleged that they “would not have bought the products had they known the truth about them” and that they paid “a premium price for inferior or undesirable ingredients”); *Lanovaz v. Twinings N. Am., Inc.*, 2013 WL 675929, at \*6 (N.D. Cal. Feb. 25, 2013) (injury-in-fact shown by “alleged purchase of a product that plaintiff would not otherwise have purchased but for the alleged unlawful label”).<sup>8</sup>

Certainly, where a defendant misrepresents the existence of some characteristic of a product and a consumer purchases the product and pays a premium *for that characteristic*, the defendant cannot escape liability for that misrepresentation by claiming, as VW does here, that the consumer wasn't injured because the product worked fine for its "ordinary purpose," VW Br. at 21. *See Victor*

<sup>8</sup> See also *Jou v. Kimberly-Clark Corp.*, 2013 WL 6491158, at \*3 (N.D. Cal. Dec. 10, 2013) (standing found where plaintiffs paid a premium for products labeled “natural” and would not have purchased the products but for the defendants’ misrepresentations); *Bruton v. Gerber Prod. Co.*, 961 F. Supp. 2d 1062, 1087-88 (N.D. Cal. 2013), *rev’d and remanded on other grounds*, 2017 WL 3016740 (9th Cir. July 17, 2017) (plaintiff adequately alleged injury-in-fact where she “claim[ed] that she paid for products that she would not otherwise have purchased”).

1 *v. R.C. Bigelow, Inc.*, 2014 WL 1028881 (N.D. Cal. Mar. 14, 2014); *In re Clorox Consumer Litig.*,  
 2 2013 WL 3967334, at \*4 (N.D. Cal. July 31, 2013) (standing found where plaintiffs alleged that they  
 3 paid a premium for certain features and that defendant's product did not "perform as advertised");  
 4 *Morgan v. Wallaby Yogurt Co., Inc.*, 2013 WL 5514563; *cf. Davidson v. Kimberly-Clark Corp.*, 873  
 5 F.3d 1103, 1111 (9th Cir. 2017). Indeed, other judges in this District have explicitly rejected this  
 6 type of attack on standing. In *Bigelow*, for example, the plaintiff alleged that the defendant had  
 7 falsely labeled its tea as containing "healthful antioxidants," that he "paid a premium for purported  
 8 nutritional and health benefits that the product did not have," and that he would not have purchased  
 9 the tea had he known that the claim did not comport with food labeling standards and the tea did not  
 10 in fact have the claimed nutritional and health value. 2014 WL 1028881, at \*4. *Bigelow* argued that  
 11 plaintiff had not suffered a "real or compensable harm" because he "consumed [the products]  
 12 without incident or physical injury," and because the products "were not unfit for their intended use"  
 13 and were not "tainted, spoiled, or contaminated." 2014 WL 1028881, at \*4. Judge Orrick found that  
 14 *Bigelow* had "seriously misconstrue[d] the plaintiff's contentions" and had "missee[d] the point,"  
 15 finding that "Bigelow's argument leads to the untenable conclusion that consumers have no legal  
 16 recourse for intentionally misidentified products. Such a result has no basis in law, and the plaintiffs  
 17 have standing." *Id.*

18 Here, Plaintiffs allege all the elements necessary to establish an injury-in-fact. *First*, Plaintiffs  
 19 allege that VW marketed its "clean diesel" Vehicles on the basis of environmental performance—  
 20 *i.e.*, VW's marketing campaign for the Vehicles hinged on the "cleanliness" of the Vehicles, which  
 21 VW used to distinguish their "clean" diesels from the "dirty" diesel vehicles of the past.<sup>9</sup> *Second*,

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23 <sup>9</sup> See, e.g., ¶ 12 ("The purported environmental benefit of these vehicles was their identifying  
 24 characteristic and the basis upon which Defendants marketed them."); ¶ 285 ("VW's entire  
 25 marketing campaign, from the branding of the products to the advertisements, focused on convincing  
 26 consumers that the Class Vehicles were not merely compliant with emission regulations, but that  
 27 they exceeded them."); ¶ 289 ("Volkswagen distinguished TDI 'clean' diesel engines from other,  
 28 'stinky, smoky, sluggish' diesels, proclaiming its 'eco-conscious' status and failing to disclose that  
 the Class Vehicles were 'dirty' themselves. These messages were prevalent in Volkswagen's  
 extensive marketing campaign."); ¶ 380 ("Class members were promised that their vehicles would be  
 environmentally friendly low-emission vehicles. This was the identifying characteristic of the Class  
 Vehicles, and formed the basis for Defendants' marketing of them.").

1 Plaintiffs allege that VW charged a premium for their “clean diesel” vehicles,<sup>10</sup> and allege facts  
 2 supporting the existence of the premium.<sup>11</sup> Finally, the Complaint alleges that Plaintiffs and Class  
 3 members did not receive the “clean diesel” which was the very thing for which they paid a  
 4 premium.<sup>12</sup>

5 These allegations establish a “quintessential injury-in-fact” under the law of this Circuit: *i.e.*,  
 6 that Plaintiffs “spent money that, absent defendants’ actions, they would not have spent.” *Maya v.*  
 7 *Centex Corp.*, 658 F.3d at 1069.

8 **b. VW’s reliance on “no-injury product liability” cases is misplaced.**

9 VW suggests that for standing purposes, Plaintiffs cannot merely allege they overpaid for a  
 10 “defective” product, but must allege “something more”—specifically, a “malfunction” or a “defect”  
 11 that “manifest[s].” VW Br. at 20-21. VW claims that Plaintiffs cannot be found to have been injured  
 12 because VW’s Vehicles “never malfunction[ed]” and no “defect []ever manifest[ed].” *Id.* at 21. But  
 13 this Court has already rejected that standing argument, ruling as follows in *Napleton*:

14 Cases cited by Bosch are not on point because they involve scenarios  
 15 in which a product defect never manifests. *See, e.g., Briehl v. Gen.*  
*Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999) (“Plaintiffs have not

16 <sup>10</sup> *See, e.g.,* ¶ 10 (“Defendants induced Plaintiffs and Class members to purchase or lease the  
 17 Class Vehicles—at a cost premium—by advertis[ing] them as “clean diesel” cars which would  
 18 benefit the environment.”); ¶ 379 (“In fact, Class members paid a premium for this purportedly clean  
 19 diesel engine . . . .”); ¶ 6 (“. . . Volkswagen secretly turned the most environmentally-conscious  
 consumers into some of the biggest polluters on the road—and charged them a premium in the  
 process.”); ¶ 320 (“Volkswagen . . . charg[ed] premiums of thousands of dollars for the ‘clean’ diesel  
 models of the Class Vehicles.”).

20 <sup>11</sup> Plaintiffs allege at least three facts supporting the existence of the premium: (1) the decline in  
 21 value suffered by the Vehicles after the announcement of VW’s fraud, which “confirms that  
 22 consumers and the market ascribe independent value to the use of a vehicle which is environmentally  
 23 friendly,” ¶ 12; (2) the fact that “Class Vehicles leased at a higher per-month rate than other vehicles  
 with otherwise similar traditional performance,” ¶ 380; and (3) the price differential between “clean  
 diesel” vehicles and their regular gasoline counterparts, which the Complaint uses to estimate the  
 amount of the clean-diesel premium, ¶ 379.

24 <sup>12</sup> *See, e.g.,* ¶ 380 (“Despite paying this ‘clean-diesel premium,’ Class members never obtained  
 25 the promised environmental benefits.”) ¶ 4 (Plaintiffs and Class members “never received the clean  
 26 emissions performance Defendants’ promised during their period of ownership”); ¶ 10 (“Plaintiffs  
 27 and Class members never received the cars they bargained for or enjoyed the environmental  
 28 performance they were promised.”); ¶ 12 (“Class members were originally and primarily injured  
 when Defendants did not provide them with the superior environmental characteristics that Class  
 members bargained for.”). Individual Plaintiffs also allege specifically that they “paid a substantial  
 amount for something [they] never received.” ¶¶ 24, 27, 38, 51, 57, 62, 69, 72, 77, 81, 85, 94, 98,  
 103, 108, 113, 118, 124, 131, 141, 145, 149, 154.

alleged that their ABS brakes have malfunctioned or failed.”); *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales Practices and Prods. Liab. Litig.*, 915 F. Supp. 2d 1151, 1157 (C.D. Cal. 2013) (plaintiff has not presented “any evidence that the ABS in his vehicle malfunctioned or failed....”). That is not the situation here, where the defeat device has made the affected vehicles unsaleable.

2017 WL 4890594, at \*3.

To support its argument, VW once again cites to a number of cases (including the cases cited by this Court in the foregoing quotation) that courts have referred to as “no-injury product liability” cases, in which courts refused to find standing where plaintiffs alleged injury from a defective product. Each of these cases is distinguishable from the present action for at least one of the two reasons below.

First, VW cites a number of cases in which courts were reluctant to find an injury based on the plaintiffs' loss of the "benefit of the bargain" where there was no indication that the "bargain" actually contemplated the subject of plaintiffs' alleged defect—primarily because the defendant made no false representations regarding the alleged defect.<sup>13</sup> This is not such a case. Here, Plaintiffs allege that that VW intentionally failed to inform Plaintiffs that their Vehicles were not legally saleable and affirmatively lied about their environmental benefits and emissions levels. *See, e.g.*, ¶¶ 216, 283, 282-321. Plaintiffs relied on those omissions and misrepresentations, *see, e.g.*, ¶¶ 6, 25, 28, 33, 39, 379, 502, 568, and VW charged Plaintiffs a premium on the basis of those omissions and misrepresentations, *see, e.g.*, ¶¶ 6, 10, 320, 379, 380. In other words, Plaintiffs allege that based on VW's misrepresentations, they paid a premium for "clean diesel" vehicles, which they did not receive due to Defendants' actions. *See supra*, Section IV.A.1.a. Courts routinely reject attempts to

<sup>13</sup> See *Contreras v. Toyota Motor Sales USA, Inc.*, 2010 WL 2528844 (N.D. Cal. June 18, 2010), *aff'd in part, rev'd in part*, 484 F. App'x 116 (9th Cir. 2012) (no standing where plaintiffs did not allege that defendant had promoted the allegedly defective braking system as an added safety feature); *Lassen v. Nissan N. Am., Inc.*, 211 F. Supp. 3d 1267, 284 (C.D. Cal. 2016) (no standing where plaintiffs "did not purchase their vehicles based on any expectation that they included [the] additional safety features"); *Barakeyan v. BMW of N. Am., LLC*, 2016 WL 2840803, at \*4 (C.D. Cal. Apr. 7, 2016) (no standing where plaintiff did not allege that defendants made any false representation about brake noise levels); *Lee v. Toyota Motor Sales, U.S.A., Inc.*, 992 F. Supp. 2d 962 (C.D. Cal. 2014) (no standing where plaintiffs did not allege that defendants made any false representation regarding the specific performance of the challenged system); *Anderson v. Hyundai Motor Co. Ltd.*, 2014 WL 12579305 (C.D. Cal. July 24, 2014) (same); *Cahen v. Toyota Motor Corp.*, 147 F. Supp. 3d 955, 969 (N.D. Cal. 2015) (same); *Herrington v. Johnson & Johnson Consumer Cos., Inc.*, 2010 WL 3448531, at \*3 (N.D. Cal. Sept. 1, 2010) (same); *Koronthaly v. L'Oreal USA, Inc.*, 374 F. App'x 257 (3rd Cir. 2010) (same).

1 rely on product defect cases to defeat standing in the context of allegations similar to those in the  
 2 Complaint here. *See, e.g., Bigelow*, 2014 WL 1028881, at \*4; *Stanwood v. Mary Kay, Inc.*, 941 F.  
 3 Supp. 2d 1212, 1217 (C.D. Cal. 2012) (product defect cases “would only be relevant if [plaintiff]  
 4 was seeking redress for an injury related to some defect in the products. She is not. . . . Rather, she  
 5 was injured because Mary Kay made false representations . . . which induced her to buy a non-  
 6 defective product she otherwise would not have purchased.”).<sup>14</sup> This Court should do so as well.<sup>15</sup>

7 *Second*, even if VW’s criminal defrauding of consumers were analyzed as a mere “defect,”  
 8 there is simply no question that the “defect”—the intentional failure to comply with emissions  
 9 requirements—“manifested” itself in each one of the Class Vehicles, as this Court already explained  
 10 in *Napleton*.<sup>16</sup> Plaintiffs allege not only that each of their Vehicles failed to provide the performance  
 11 promised by VW<sup>17</sup> but also that VW designed this failure to be a part of—and that the failure was  
 12 thus “manifested in”—each Class Vehicle sold, *e.g.*, ¶¶ 197-216. This distinguishes the present case

13       <sup>14</sup> *See also Sanchez v. Wal-Mart Stores, Inc.*, 2008 WL 3272101 (E.D. Cal. Aug. 6, 2008)  
 14 (distinguishing “no injury products liability actions” and finding plaintiff had standing where she  
 15 sought recovery for economic harm of having purchased a stroller that was rendered less valuable  
 due to an alleged defect).

16       <sup>15</sup> VW also cites a number of cases in which courts found that plaintiffs *did* have standing, but  
 17 unsuccessfully argues that plaintiffs in those cases somehow alleged more concrete injury than  
 18 Plaintiffs here. *See Sloan v. GM LLC*, 2017 WL 3283998, at \*2 (N.D. Cal. Aug. 1, 2017) (plaintiffs  
 19 had standing where they alleged overpayment for a defective vehicle, despite the fact that “none of  
 the Plaintiffs allege[d] that their vehicles actually experienced [the alleged defect’s adverse  
 effects]”); *In re Toyota Motor Corp., Unintended Acceleration Mktg., Sales Practices, & Prods.*  
*Liab. Litig.*, 790 F. Supp. 2d 1152, 1166 (C.D. Cal. 2011) (“As long as Plaintiffs . . . offer detailed,  
 non-conclusory factual allegations of the product defect, the economic loss injury flows from the  
 plausibly alleged defect at the pleadings stage.”).

20       <sup>16</sup> Even if Plaintiffs had not alleged the manifestation of the “defect,” courts have held that such a  
 21 manifestation is not necessary to establish that plaintiffs have standing—even in no-injury product  
 22 liability cases like those cited by VW. *See, e.g., Toyota Acceleration Litig.*, 754 F. Supp. 2d at 1162  
 (a manifested defect is not necessary for standing where plaintiffs allege economic injuries based on  
 23 a “benefit of the bargain” theory); *Kearney v. Hyundai Motor Co.*, 2010 WL 9093204 (C.D. Cal.  
 June 4, 2010) (plaintiffs had standing “even when the alleged defects did not later materialize—i.e.,  
 24 the loss was suffered at the moment of purchase”) (emphasis in original); *Cole v. GMC*, 484 F.3d  
 717, 723 (5th Cir. 2007) (plaintiffs had standing where they overpaid for defective vehicles, even  
 when those vehicles had not manifested the alleged defect).

25       <sup>17</sup> ¶¶ 20 (Plaintiff Nemet), 25 (Plaintiff Kahlert), 29 (Plaintiff Angela Matt Architect, Inc.), 33  
 26 (Plaintiff Field), 40 (Plaintiff Dreher), 45 (Plaintiff Schell), 52 (Plaintiff Sheffield), 58 (Plaintiff  
 27 Lecours), 63 (Plaintiff De La Cruz), 66 (Plaintiff Winebaugh), 70 (Plaintiff Skena), 73 (Plaintiff St.  
 Croix), 78 (Plaintiff Olson), 82 (Plaintiff Kubala), 88 (Plaintiff Daly), 95 (Plaintiff Ferdinand), 99  
 (Plaintiff Galluccio), 104 (Plaintiff Rawczak), 109 (Plaintiff Miller), 114 (Plaintiff Hofmann), 120  
 (Plaintiff Siehl), 125 (Plaintiff Schell), 132 (Plaintiff Conner), 136 (Plaintiff Dunn), 142 (Plaintiff  
 28 Salgado), 146 (Plaintiff Bowman), 150 (Plaintiff Mosley).

1 from those cited by VW in which the courts found no standing where plaintiffs had failed to allege  
 2 that the defect had actually manifested itself in the plaintiffs' products, or that there was sufficient  
 3 risk that it would do so.<sup>18</sup>

4 This case is not a no-injury products liability case masquerading as a consumer fraud case.  
 5 This is a quintessential consumer fraud case in which Plaintiffs allege not only that the Vehicles  
 6 malfunctioned (*i.e.*, did not perform either as advertised or as required by law) from the time of  
 7 purchase, but that the “malfunction” reflected the failure of the very aspect of performance for which  
 8 VW was charging a premium. In other words, not only did Plaintiffs and class members pay a  
 9 premium for the Vehicles, but they paid that premium specifically for the feature—the “clean diesel”  
 10 performance—that the Vehicles failed to deliver. This is a “quintessential injury-in-fact.”

11 **c. VW's claim that Plaintiffs fully recouped their losses ignores controlling and  
 12 contrary allegations in the Complaint and is irrelevant to standing.**

13 Flying in the face of common sense, VW asserts that Plaintiffs lack standing because they  
 14 somehow recouped 100% of the premium they paid for their vehicles when they subsequently sold

15 <sup>18</sup> See *Hubert v. Gen. Nutrition Corp.*, 2017 WL 3971912, at \*8 (no standing where plaintiffs  
 16 failed to allege that the product “did not deliver the advertised benefits”); *Contreras*, 2010 WL  
 17 2528844 (no standing where plaintiffs failed to allege that their vehicles had actually manifested the  
 18 alleged defect in their braking system); *Lassen*, 211 F. Supp. 3d 1267 (no standing where plaintiffs  
 19 made no allegation that the vehicle had malfunctioned, but “merely suggest[ed] possible changes . . .  
 20 which they believ[ed] would make the product safer”); *Lee*, 992 F. Supp. 2d 972 (no standing where  
 21 plaintiffs’ own allegations showed that the vehicle systems challenged by plaintiffs “perform[ed] as  
 22 described,” and no defect had manifested itself in plaintiffs’ vehicles); *Anderson*, 2014 WL  
 23 12579305 (plaintiffs failed to “demonstrate[] that there [was] any defect in the [vehicle]”) (emphasis  
 24 in original); *Cohen*, 147 F. Supp. 3d at 968 (“plaintiffs [did] not allege that any consumer, outside  
 25 the realm of controlled experiments, has ever been a victim of [the injury that might be caused by the  
 26 alleged defect]”); *Herrington*, 2010 WL 3448531, at \*3 (plaintiffs failed to allege that the chemicals  
 27 in defendants’ bath products even posed a substantial risk of harm, much less had manifested in any  
 28 actual harm to anyone); *Koronthaly*, 374 F. App’x 257 (plaintiffs did not allege that lead levels in  
 lipstick caused any actual harm, and levels were found safe by FDA); *In re Toyota Motor Corp.  
 Hybrid Brake Mktg., Sales Practices & Prods. Liab. Litig.*, 915 F. Supp. 2d 1151 (C.D. Cal. 2013)  
 (alleged defect never manifested) *cf. Briehl v. GMC*, 172 F.3d at 628 (no analysis of standing;  
 granting motion to dismiss for failure to state a claim where vehicle “never exhibit[ed] the] alleged  
 defect”); *Bussian v. DaimlerChrysler Corp.*, 411 F. Supp. 2d 614, 623 (M.D.N.C. 2006) (no analysis  
 of standing; noting only, in context of a warranty claim, that the “ordinary purpose of an automobile  
 is to provide transportation”); *Licul v. Volkswagen Grp. of Am., Inc.*, 2013 WL 6328734, at \*5 (S.D.  
 Fla. Dec. 5, 2013) (no standing analysis; granting motion to dismiss where plaintiff did not “suffer  
 from the defect itself during the term of her title to the [vehicle]”); *Schmier v. U.S. Court of Appeals  
 for the Ninth Circuit*, 279 F.3d 817 (9th Cir. 2002) (attorney didn’t have standing to challenge rule  
 prohibiting citation to unpublished decisions where he did not allege that he had himself ever been  
 sanctioned or otherwise adversely affected by the rule).

them. *See* VW Br. at 1, 16-17, 24, 26, 27.<sup>19</sup> This argument ignores that the Complaint alleges that “Class members [*could not*] have recouped the full premium that they paid for that initial clean diesel performance,” ¶ 382.<sup>20</sup> In other words, even if some Class members sold their Vehicles before VW’s fraud was announced,<sup>21</sup> and even if, as the Complaint alleges, subsequent purchasers were willing to pay “slightly more at the time of resale because of the perceived environmental benefits” of the Vehicles, *id.*, those subsequent purchasers were not reimbursing the seller for the entire clean-diesel premium. Indeed, such a suggestion is absurd because, as the Complaint alleges, subsequent purchasers were paying for the clean diesel performance they themselves expected to enjoy in the future—not reimbursing Class members for past clean diesel performance, ¶ 382. Moreover, the Complaint spells out why consumers who purchased a new Vehicle suffered an *immediate* injury in the form of an unrecoupable “new vehicle premium”—part of which consists of an *overpayment* for the “clean diesel” feature they did not receive. ¶ 13.<sup>22</sup> None of the cases cited by VW for its “recoupment” argument provide grounds for ignoring these allegations.<sup>23</sup>

<sup>19</sup> VW’s half-hearted nod to securities cases involving “in-and-out” traders, VW Br. at 16 n.14, suggests a realization that analogizing to such cases is too far a stretch in the present case. Stocks, unlike vehicles, do not depreciate; so while it may be true that a stock trader who sells fraudulently inflated stock while the fraud is still unknown may suffer no injury, the same cannot be said for sellers of depreciating assets such as vehicles.

<sup>20</sup> *See also id.* (“Class members could not have recouped the ‘new vehicle’ premium . . .”); ¶ 13 (“By definition, [the] new vehicle premium cannot be recouped by a subsequent sale.”); ¶¶ 24, 27, 38, 51, 57, 62, 69, 72, 77, 81, 85, 94, 98, 103, 108, 113, 118, 124, 131, 141, 145, 149, 154 (“Plaintiff paid a substantial amount for something she [or he] never received, and was unable to fully recoup that loss through the subsequent sale of the Vehicle.”).

<sup>21</sup> The Class is not limited to those consumers who *sold* their Vehicles prior to the announcement of the fraud, but includes all consumers who “no longer owned, held an active lease for, or otherwise had a legal interest” in their vehicles. ¶ 401. This would include, for example, consumers who gifted their Vehicles, or whose Vehicles were destroyed in an accident—none of whom would have had an opportunity to recoup any damages through subsequent sales of their Vehicles.

<sup>22</sup> The Complaint provides additional detail as to this allegation in the form of a specific example of how the “new vehicle premium” interacts with the clean-diesel premium: “For example, assume one of the plaintiffs paid a ‘clean diesel’ premium of \$6,000 and that the purchase price was \$22,000. The clean diesel premium was 27% of the purchase price. Assuming the vehicle depreciated by a total of \$8,875 during ownership, the clean diesel feature accounted for approximately \$2,400 of that depreciation (27% x \$8,875). This \$2,400 is an overpayment not compensated for in any sale pre-September 18, 2015.” ¶ 13.

<sup>23</sup> *Licul v. Volkswagen Grp. of Am., Inc.*, 2013 WL 6328734, at \*5 (no analysis of standing; granting motion to dismiss where plaintiff never “suffer[ed] from the defect itself during [her ownership of the vehicle],” and didn’t allege that she had paid a premium); *Cohen*, 147 F. Supp. 3d

1        This point also serves to undermine VW’s implicit plea that it would be unfair to demand that  
 2 Defendants compensate Class members here, since such a demand would require “that Defendants  
 3 pay a second time for the same defeat devices in *same vehicles*,” VW Br. at 17 (emphasis in  
 4 original), *see also id.* at 2 (claiming Plaintiffs are seeking to force VW to pay “double  
 5 compensation”). Plaintiffs’ theory of damages here is that the clean-diesel premium paid by  
 6 consumers was paid for performance that VW failed to provide to any and all purchasers and lessees  
 7 of the Vehicles. The fact that VW chose to compensate only a subset of those purchasers/lessees in  
 8 the Consumer Settlements is irrelevant to whether the rest of the purchasers/lessees—Class members  
 9 in this action—are entitled to compensation or restitution. Much less is that fact relevant to whether  
 10 Plaintiffs in this action allege a sufficient injury-in-fact to establish standing.

11        VW’s recoupment argument similarly makes no sense in the context of Class members who  
 12 leased their vehicles. VW does not even attempt to explain how lessee Class members would  
 13 somehow have recouped their inflated monthly payments (alleged, *inter alia*, at ¶¶ 14, 30) simply  
 14 because their leases ended prior to the announcement of VW’s fraud.<sup>24</sup>

15        Implicitly acknowledging that its entire “recoupment” argument lies wholly outside the  
 16 bounds of the Complaint, VW cites to a purported “expert” declaration submitted in conjunction with  
 17 final approval of the previous Consumer Settlements (which excluded Class members in this action).  
 18 VW Br. at 1 (quoting Declaration of Robert H. Klonoff Addressing Objections by Class Members to  
 19 the Proposed Volkswagen “Clean Diesel” Settlement, Dkt. 1976-1, ¶ 79). But VW does not claim to  
 20 be mounting a factual attack on Plaintiffs’ standing, such that the Court could rely on VW’s extrinsic  
 21 “evidence” to establish an issue of fact relevant to standing. *Cf. Safe Air for Everyone v. Meyer*, 373  
 22 F.3d 1035, 1039 (9th Cir. 2004) (explaining the difference between a Rule 12(b)(1) “factual” and a

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23        at 971 (no standing where the “alleged economic injury rest[ed] solely upon the existence of a  
 24 speculative risk of future harm” from criminal hacking).

25        <sup>24</sup> VW’s argues that Plaintiffs have “not plausibly alleged that any depreciation built into the  
 26 lease payments is traceable to the defeat devices.” VW Br. at 29. But this is essentially the same as  
 27 its argument that Plaintiffs have failed to allege causation because the Vehicles’ depreciation was not  
 28 “caused by” the defeat devices, and suffers from the same defects discussed *infra*, Section IV.A.2.b.  
 Plaintiffs’ clear allegations that the clean-diesel premium depreciates applies equally to purchasers  
 and lessees, whose lease payments are alleged to have been based on an inflated initial value for the  
 Vehicles. *E.g.* ¶¶ 14, 30.

“facial” attack on standing). Nor would Mr. Klonoff’s declaration be admissible evidence for the proposition VW cites. Mr. Klonoff is a law professor with a purported expertise in “complex civil litigation and civil procedure,” Dkt. 1976-1, ¶ 2, and no apparent expertise in economics (other than a bachelor’s degree in political science/economics), *id.*, Appendix A. Nonetheless, VW suggests that the Court should credit Mr. Klonoff’s “expert” opinion that individuals who sold their “clean diesel” vehicles prior to the disclosure of VW’s fraud “suffered no economic harm, since they sold their vehicles before the announcement of the fraud and the resulting price drop of the vehicles.” Dkt. 1976-1, ¶ 79. Such a factual challenge is not permissible at this stage, and on its face fails to account for key allegations in the complaint, namely (1) there is no recoupment at sale for the initial new car depreciation that included a diesel premium immediate depreciation,<sup>25</sup> and (2) that those who made inflated lease payments had zero recoupment at lease termination.<sup>26</sup>

**d. Plaintiffs’ injuries are not “generalized,” “subjective,” or “hypothetical.”**

VW suggests that Plaintiffs haven’t suffered any injury because the “direct” injury was to the public at large, VW Br. at 22, and cites cases holding that a “generalized harm to the . . . environment will not alone support standing,” *id.* at 16. VW has it backwards: the direct harm was to Plaintiffs and Class members, who overpaid for their Vehicles; the indirect harm was to the public, who suffered from increased pollution. Moreover, as established *supra*, Section IV.A.1.a, the Complaint in this action does not allege that the relevant injury to Plaintiffs consists of harm to the environment in general or to the public at large. This is a case about consumers being defrauded into purchasing vehicles based the advertised environmental benefit of those vehicles, paying a premium for that environmental benefit, and ultimately not getting what they paid for. The environmental

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<sup>25</sup> ¶ 13.

<sup>26</sup> See *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (“[F]actual challenges to a plaintiff’s complaint have no bearing on the legal sufficiency of the allegations under Rule 12(b)(6). Yet, in this case, defendants’ arguments in favor of affirming the dismissal of plaintiffs’ federal claims rest almost entirely on factual challenges. More importantly, the district court’s decision to dismiss plaintiffs’ federal claims was rooted in defendants’ factual assertions. In granting defendants’ motions, the court assumed the existence of facts that favor defendants based on evidence outside plaintiffs’ pleadings, took judicial notice of the truth of disputed factual matters, and did not construe plaintiffs’ allegations in the light most favorable to plaintiffs. We therefore also reverse the district court’s dismissal....”).

1 cases VW attempts to conflate with this case are simply not on point.<sup>27</sup> Nor does VW’s citation to the  
 2 Court’s 2.0-Liter Settlement Order establish as a matter of law that VW’s fraud caused direct harm  
 3 only to the environment, and thus that Plaintiffs did not suffer an injury-in-fact sufficient to confer  
 4 standing.<sup>28</sup>

5 Nor are Plaintiffs alleging a merely subjective harm. As courts have recognized: “simply  
 6 stated, . . . labels matter,” and indeed “the marketing industry is based on the premise that labels  
 7 matter, that consumers will choose one product over another similar product based on its label and  
 8 various tangible and intangible qualities they may come to associate with a particular source.” *Ross*  
 9 *v. Sioux Honey Ass’n, Co-op.*, 2013 WL 146367, at \*6 (N.D. Cal. Jan. 14, 2013) (quoting *Kwikset*  
 10 *Corp. v. Superior Court*, 51 Cal. 4th 310, 328 (2011)). Here, VW marketed its Vehicles as “clean”  
 11 diesels, consumers bought them and paid a premium for them on that basis, and due to VW’s fraud,  
 12 consumers did not get the promised “clean” vehicles. None of the cases cited by VW suggest that  
 13 such an injury is too “subjective” to establish standing, and all are easily distinguishable.<sup>29</sup>

14 Finally, VW refers to the alleged clean-diesel premium as “hypothetical,” VW Br. at 4, 24,  
 15 and attempts to discredit the Complaint’s allegations of the existence of that premium by  
 16 focusing on the assumptions made by Plaintiffs in their hypothetical examples—examples VW

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17       <sup>27</sup> *Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009) (environmental organizations lacked  
 18 standing where they failed to identify any application of the regulations at issue that “threaten[ed]  
 19 imminent and concrete harm to the interests of their members”); *Lujan*, 504 U.S. at 560  
 20 (environmental organizations lacked standing where members only professed vague “intent” to  
 return to an area where certain animal species were threatened, but no specific plans that would  
 satisfy the “actual or imminent” requirement for injury).

21       <sup>28</sup> In that Order, Dkt. 2102 at 16, the Court referred to the declaration of Andrew Kull, in which  
 22 Mr. Kull opined that “[t]he direct harm caused by the TDI engines’ nonconformity was not to the  
 23 vehicle owner—who obtained a vehicle that performed as expected—but to the public at large.” Dkt.  
 24 1784-2 ¶ 28(b). The Court’s citation to that declaration, however, did not establish Mr. Kull’s  
 25 opinion to be fact—nor should it have, since Mr. Kull is not an economist and was not called on to  
 offer an expert opinion as to the nature and extent of all possible damages incurred by consumers as  
 a result of the defendants’ actions. *Id.* at 22 (Mr. Kull’s background as a law professor). More  
 importantly, however, the Court’s citation to Mr. Kull’s declaration was in the context of approving a  
 class settlement, and the Court specifically noted that it “need[ed] not ‘reach any ultimate  
 26 conclusions on the contested issues of fact and law which underlie the merits of the dispute.’” Dkt.  
 27 2102 at 15.

28       <sup>29</sup> *Barakezyan*, 2016 WL 2840803, at \*4 (no standing where plaintiff didn’t allege any false  
 29 representations or that vehicle failed to perform as advertised); *Laird v. Tatum*, 408 U.S. 1 (1972) (no  
 standing where plaintiffs alleged only a subjective chilling effect on their actions as a result of  
 challenged governmental surveillance program).

1 claims establish that Plaintiffs' alleged injuries are "hypothetical and speculative." *Id.* at 13-14. VW  
 2 then cites cases noting that an injury-in-fact for standing purposes must not be "hypothetical." *Id.* at  
 3 15-16. But nowhere does VW explain what is "hypothetical" about the alleged clean-diesel premium;  
 4 as explained above, Plaintiffs not only allege that the clean-diesel premium exists,<sup>30</sup> but allege  
 5 specific facts supporting its existence.<sup>31</sup> Nor do any of the cases cited by VW undermine the fact that  
 6 those allegations establish an injury-in-fact, or suggest that the mere use of hypothetical examples in  
 7 a Complaint somehow renders its allegations of concrete harm "hypothetical" for standing  
 8 purposes.<sup>32</sup>

9 **2. Plaintiffs' injuries are "fairly traceable" to Defendants' conduct.**

10 **a. Plaintiffs' allegations establish causation for standing purposes.**

11 "[C]ourts have consistently held that the Article III standard for showing that an injury is  
 12 'fairly traceable' to the defendant is 'relatively modest.'" *Phillips v. Apple Inc.*, 2016 WL 5846992,  
 13 at \*8 (quoting *Bennett v. Spear*, 520 U.S. 154, 171 (1997)). "To survive a motion to dismiss for lack  
 14 of constitutional standing, plaintiffs must establish a 'line of causation' between defendants' action  
 15 and their alleged harm that is more than 'attenuated.'" *Maya*, 658 F.3d at 1070 (quoting *Allen v.*  
 16 *Wright*, 468 U.S. 737, 757 (1984)). "A causal chain does not fail simply because it has several  
 17 'links,' provided those links are 'not hypothetical or tenuous' and remain 'plausib[le]'." *Id.* (quoting  
 18 *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002). In other words, "[w]hat  
 19 matters is not the length of the chain of causation, but rather the 'plausibility of the links that  
 20 comprise the chain." *Id.* (quoting *Autolog Corp. v. Regan*, 731 F.2d 25, 31 (D.C.Cir.1984)).

21 Where plaintiffs allege that they would not have purchased a product but for the defendant's  
 22 actions, they allege a sufficient causal link to establish standing. Thus, in *Maya*, where plaintiffs  
 23 alleged "that they would not have purchased their homes had there been proper disclosure of

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25 <sup>30</sup> *See supra*, n.10.

26 <sup>31</sup> *See supra*, n.11.

27 <sup>32</sup> *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (remanding standing question where plaintiff  
 28 alleged "people search engine" company disseminated false information about him); *Schmier*, 279  
 F.3d 821 (plaintiff did not allege that he had himself ever been adversely affected by the challenged  
 rule, or even that he would be in the future); *Lujan*, 504 U.S. 555 (*see supra*, note 27).

1 defendants' lending practices," the Court found that plaintiffs had alleged "a direct causal link  
 2 between defendants' allegedly faulty disclosure and plaintiffs' injuries." *Maya*, 658 F.3d at 1070; *see*  
 3 *also Bigelow*, 2014 WL 1028881, at \*4 (plaintiff had pled sufficient causation for standing where he  
 4 attributed to defendant the "mislabeling which led him to purchase products he would not have  
 5 otherwise purchased"); *cf. Davidson v. Kimberly-Clark Corp.*, 873 F.3d 1103, 1111-12 (9th Cir.  
 6 2017) ("a consumer's allegation that 'she would not have bought the product but for the  
 7 misrepresentation . . . is sufficient to allege causation . . . [and] to allege economic injury.'") (quoting  
 8 *Kwikset*, 51 Cal. 4th at 330).

9       Here, each Plaintiff alleges that he or she "would not have purchased [or leased] [their]  
 10 Vehicle[s] . . . had Defendants not concealed the illegal cheat device," ¶¶ 20, 25, 28, 33, 40, 45, 52,  
 11 58, 70, 73, 78, 82, 86, 99, 104, 109, 119, 125, 132, 150, and/or that they "would not have purchased"  
 12 the Vehicles "had [he or she] known the true emission levels and gas mileage," ¶¶ 58, 63, 66, 70, 78,  
 13 82, 95, 142, 146. Plaintiffs also allege generally that "Class members would not have purchased  
 14 Class Vehicles were it not for Defendants' misrepresentations and fraudulent conduct," ¶ 384, and  
 15 that Defendants' misrepresentations were "material" both to government regulators and to Plaintiffs  
 16 and Class members, *e.g.*, ¶¶ 502, 528, 545, 579, and that the facts were "material" because "[a]  
 17 vehicle made by a reputable manufacturer of environmentally clean vehicles is worth more than an  
 18 otherwise comparable vehicle made by a disreputable and dishonest manufacturer of polluting  
 19 vehicles that conceals the amount its car pollutes rather than make environmentally friendly  
 20 vehicles," *e.g.*, ¶¶ 579, 599, 613. Indeed, Plaintiffs here go further than simply alleging they would  
 21 not have purchased their Vehicles but for Defendants' conduct—they allege that VW *could not* have  
 22 legally sold any of the Vehicles without complying with emission regulations, ¶¶ 188-190 (emphasis  
 23 added); *see also* ¶ 10 ("[n]o Plaintiff or Class member would—*or could*—have purchased the Class  
 24 Vehicles but for Defendants' fraudulent scheme") ¶ 7 (emphasis added); ¶ 384 ("[n]one of the sales  
 25 or leases to Class members could have been completed absent Defendants' fraudulent conduct"); ¶ 7  
 26 (as a result of Defendants' conduct, "there were over half a million cars on American roads with  
 27 illegal emission systems that never should have been leased or sold, and would not have [been], but  
 28 for Volkswagen's fraudulently obtained [certificates of conformity with emissions regulations]").

1 Plaintiffs allegations are more than sufficient to establish that their injuries are “fairly  
 2 traceable” to Defendants’ actions.

3 **b. VW’s causation arguments fail.**

4 Although the allegations above suffice, standing alone, to support that Plaintiffs’ injury-in-  
 5 fact is “fairly traceable” to Defendants’ conduct, VW insists on muddying the waters with a jumble  
 6 of arguments about causal links that are supposedly missing from the Complaint. All of these  
 7 arguments miss their marks, many of them for the same basic reason: VW ignores the most critical  
 8 causal link alleged in the Complaint, which is the fact that VW’s misconduct caused Plaintiffs to pay  
 9 a clean-diesel premium that they would not have paid but for VW’s fraud—a premium that resulted  
 10 in an initial purchase value that was artificially inflated.

11 *First*, VW argues that Plaintiffs do not sufficiently allege that the clean-diesel premium “is  
 12 traceable to the defeat devices, as opposed to other characteristics of the vehicles.” VW Br. at 28; *see*  
 13 *also id.* at 23, 25 (“Tying the ‘premium’ to NOx emissions is a critical element missing from the  
 14 Complaint . . .”). In other words, VW argues, Plaintiffs should bear the burden of alleging that a  
 15 specific portion of the clean-diesel premium is attributable to reduced NOx emissions, as opposed to  
 16 the “other benefits of the diesel vehicles,” *id.* at 25. This argument is flawed for two reasons. First,  
 17 the argument misunderstands the relevant causal connection for purposes of standing, which is not  
 18 the connection between lower NOx emissions and the clean-diesel premium, but between  
 19 Defendants’ misrepresentations and Plaintiffs’ injuries. The latter connection is clearly alleged in the  
 20 Complaint. *See supra*, Section IV.A.2.a. Second, VW misconstrues the Complaint, which alleges not  
 21 that VW promised consumers a collection of an unrelated, discrete features but rather that VW  
 22 promised a *combination of features* that all fell under the rubric of “clean diesel.” Although the  
 23 environmental performance of the Vehicles was their “identifying characteristic,” ¶ 380, VW didn’t  
 24 just promise consumers that they could have “clean” (*i.e.*, low-emission) vehicles—it promised that  
 25 they could have clean vehicles *without sacrificing either fuel efficiency or powerful performance*.  
 26 The Complaint is replete with quotations from VW’s own marketing materials to support the  
 27 allegation that the “linchpin of [VW’s plan to increase its U.S. sales] was increasing sales of ‘diesel-  
 28

1 powered cars . . . [and] promising high mileage and low emissions without sacrificing  
 2 performance.” ¶ 427 (emphasis added).<sup>33</sup> These were false promises, only made possible by the  
 3 existence of the “cheat device designed to bypass emissions standards and deceive consumers and  
 4 regulators”; in reality, “the Vehicle[s] could not deliver the advertised *combination* of low emissions,  
 5 high performance, and fuel economy.” *E.g.*, ¶¶ 20, 25, 29 (emphasis added).

6 Moreover, *even if* it were critical to allege a causal connection between low NOx emissions  
 7 and the clean-diesel premium paid by Plaintiffs and Class members, the Complaint does exactly that,  
 8 alleging that VW touted its ability to meet emissions standards as a key part of the Vehicles’ “clean  
 9 diesel” performance, *e.g.*, ¶¶ 285, 302, 314, and that consumers purchased the Vehicles specifically  
 10 for the promised environmental benefits, *e.g.*, ¶ 6 (“[c]onsumers believed Volkswagen and  
 11 bought . . . ‘clean’ diesel vehicles in record numbers”), ¶ 379 (“Plaintiffs and Class members bought  
 12 or leased the Class Vehicles based on [Defendants’ claims, including claims of low emissions]”); ¶¶  
 13 25, 28, 33, 39 (Plaintiffs’ individual allegations that they purchased their Vehicles for the  
 14 environmental benefits).<sup>34</sup> To the extent VW suggests that Plaintiffs are required to allege the exact  
 15 portion of the clean-diesel premium attributable to lower NOx emissions, VW’s argument is a red  
 16 herring. Even if proving damages requires parsing the various aspects of the clean-diesel premium—  
 17 which Plaintiffs believe would be unnecessary—such an analysis will be conducted by experts at  
 18 later stages of the litigation; the law does not require that Plaintiffs allege that level of detail only to  
 19 establish standing—nor does VW cite any authority to support such a requirement at the pleadings  
 20 stage, where the Court is required to “construe the pleadings in the light most favorable to  
 21 [Plaintiffs].” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).<sup>35</sup>

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22  
 23       <sup>33</sup> *See, e.g.*, ¶ 303 (brochure touting the TDI engine for its “quickness, low emissions, and fuel  
 24 efficiency”); ¶ 304 (brochure touting TDI engine’s torque, “impressive fuel efficiency,” and “fewer  
 25 sooty emissions”); ¶ 305 (brochure touting high miles-per-gallon numbers, “turbocharged  
 26 performance,” and lower emissions).

27       <sup>34</sup> Plaintiffs also allege facts that suggest that the clean-diesel premium cannot be explained  
 28 simply on the basis of the fact that the Vehicles were purported to get better gas mileage than their  
 29 gasoline counterparts. ¶ 379 (“Though the ‘clean’ diesel model achieves greater [gas] mileage, the  
 30 premium—some \$5,755—would buy enough gas to drive the non-diesel model approximately  
 31 88,000 miles at current gas prices.”).

32       <sup>35</sup> Indeed, not only are Plaintiffs not required to allege the detailed contours of the clean-diesel  
 33 premium, but Plaintiffs’ standing does not even hinge on the existence of that premium *at all*. It is

1       Second, VW argues that Plaintiffs fail to establish causation for standing because VW's  
 2 defeat devices did not cause the depreciation of Plaintiffs' Vehicles, which is simply an "economic  
 3 fact" of owning a vehicle. VW Br. at 26-28. Again, this misses the point. Plaintiffs do not allege that  
 4 VW's defeat devices caused their Vehicles to depreciate but rather allege that VW's  
 5 misrepresentations caused them to purchase vehicles that they otherwise would not (and indeed,  
 6 legally *could not*) have purchased, or at the very least to pay a clean-diesel premium that they would  
 7 not have paid but for VW's misrepresentations. Those allegations, by themselves, suffice to confer  
 8 standing. Although Plaintiffs allege that the "depreciation on [the clean diesel] premium cannot be  
 9 recovered in a sale," ¶ 13,<sup>36</sup> that fact is only relevant to Plaintiffs' ability to recoup any amount of the  
 10 clean-diesel premium in a subsequent sale and has nothing to do with whether the original injury,  
 11 which occurred at purchase, is fairly traceable to VW's criminal conduct.<sup>37</sup> In any case, Plaintiffs do  
 12 not allege that the entire amount by which their Vehicles depreciated was attributable to VW's  
 13 misconduct—only that "[a] share of that overall depreciation is allocable to the premium that  
 14 consumers paid for the 'clean diesel' feature." *E.g.*, ¶ 21.<sup>38</sup>

15  
 16 more than sufficient that Plaintiffs allege that VW advertised the Vehicles as "clean," *e.g.*, ¶¶ 12,  
 17 289; that it specifically tied its claims of "cleanliness" to the fact that the Vehicles met or exceeded  
 18 emissions standards, *e.g.*, ¶¶ 285, 302, 314; that those claims were blatant and admitted  
 19 misrepresentations, because VW knew that its misrepresentations to regulators meant that in fact the  
 Vehicles did not meet emissions standards, and were thus not "clean," *e.g.*, ¶¶ 10, 386; and that, as a  
 result of VW's misrepresentations, Plaintiffs and Class members purchased or leased Vehicles that  
 they would otherwise not have purchased, *e.g.* ¶¶ 10, 20, 25.

20       36 VW makes much of what amounts to a mathematical error in one of the Complaint's example  
 21 calculations, claiming that Plaintiffs have conceded that the clean-diesel premium does not  
 22 depreciate because "[the Complaint's] own hypothetical calculations ascribe the same \$6,000  
 23 assumed premium to a newly purchased 2009 Jetta TDI and to a 2009 Jetta TDI that was purchased  
 24 after three years of leased use, with no reduction in the amount of the 'premium' due to  
 25 depreciation." VW Br. at 27 (emphasis removed). Far from "demonstrat[ing]" the "fallacious[ness]"  
 of Plaintiffs' allegations, *id.* at 27, the use of the same premium amount in those two examples was a  
 simple mathematical error, resulting in part from the fact that the Complaint only attempts to provide  
 simple *examples* of how damages might be calculated *given a hypothetical amount for the clean-*  
*diesel premium*. The Complaint does not purport to calculate each Plaintiffs' actual damages, or the  
 amount of the clean-diesel premium, with specificity—nor does VW cite any authority suggesting  
 such a calculation is required in order to establish standing or survive a motion to dismiss.

26       37 *See also* discussion *infra*, Section IV.C.1 at 32.

27       38 VW cites to this Court's Order giving final approval to the 3.0-Liter Consumer Settlement, in  
 28 which the Court noted that "[a]ll cars depreciate over time." VW Br. at 26 (quoting Dkt. 3229 at 20).  
 VW suggests that the Court established that losses related to depreciation are "unrelated to the  
 conduct at issue in this case." *Id.* This suggestion is misleading. The Court in that Order was simply

1        *Third*, VW argues that the finance charges paid by some Plaintiffs are not “fairly traceable”  
 2 to Defendants’ alleged conduct because Plaintiffs’ “choice to use financing, and the specific  
 3 financing terms they were given . . . can be attributed to countless factors unrelated to Defendants’  
 4 alleged misconduct.” VW Br. at 28. But as with depreciation, Plaintiffs do not allege that the entirety  
 5 of the finance charges they paid are attributable to Defendants’ conduct—only the portion of their  
 6 finance charges *that they wouldn’t have paid but for Defendants’ fraud*—which is to say, the amount  
 7 by which their finance charges were inflated as a result of the clean-diesel premium they paid. Nor  
 8 does VW’s only cited authority suggest, much less hold, that finance charges are an inappropriate  
 9 category of damages merely because the overall amount of the charges is affected by factors other  
 10 than Defendants’ misconduct.<sup>39</sup>

11        *Finally*, VW argues that Plaintiffs who leased their Vehicles did not suffer an injury “fairly  
 12 traceable” to Defendants’ fraud because (a) Plaintiffs do not allege that their lease agreements “were  
 13 priced on an assumption that any alleged premium tied to NOx emissions would depreciate,” and (b)  
 14 acquisition and termination fees would have been paid for leasing “any vehicle,” and were not  
 15 alleged to have been “in any way inflated as a result of the defeat devices.” VW Br. at 29-30. Like  
 16 VW’s other arguments, this simply ignores Plaintiffs’ allegations about the nature of the clean-diesel  
 17 premium. Plaintiffs allege that “[l]ease rates are based on a vehicle’s ‘residual value,’” which is “in  
 18 turn, based on the vehicle’s initial purchase value—a value that, in the case of the Class Vehicles,  
 19 included the inflated ‘clean diesel’ premium,” and that “[t]hus, each payment made by lessee Class  
 20 members over the course of their leases contained an amount directly attributable to the ‘clean  
 21 diesel’ premium, . . . which they paid for a feature they did not receive.” ¶ 14. Plaintiffs also allege

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22 responding to an objection related to extensions of time allowed to VW under the Settlement; in no  
 23 way did the Court hold as a matter of law that no injuries based on depreciation could be related to  
 24 VW’s conduct here—much less did it hold so in the context of the specific allegations in this case,  
 25 *i.e.*, that VW charged a premium for its “clean diesel” vehicles, and that that premium was  
 26 unrecoupable in a subsequent sale due to depreciation.

27        <sup>39</sup> *Kaing v. Pulte Homes, Inc.*, 2010 WL 625365, at \*6 (N.D. Cal. Feb. 18, 2010) (injury was not  
 28 fairly traceable to defendants’ acts where it depended on a variety of other factors not in defendants’  
 29 control, including general downturn in housing market); *compare Maya*, 658 F.3d at 1070 (under  
 30 facts very similar to those in *Kaing*, rejecting defendants’ attempt to require proximate causation in  
 31 the standing context, and noting that “[w]hat matters is not the length of the chain of causation, but  
 32 rather the plausibility of the links that comprise the chain”).

1 that they “would not have leased the[ir] Vehicle[s] had Defendants not concealed the illegal cheat  
 2 device,” *e.g.* ¶ 29, and “would never have paid [lease-related fees to VW] had [they] been informed  
 3 of the fraud either before or during the course of the Lease,” *e.g.*, ¶ 32. These allegations are more  
 4 than sufficient to establish standing, which necessitates only that Plaintiffs allege they would not  
 5 have purchased a product, or would have paid less for it, but for Defendants’ actions. *See Maya*, 658  
 6 F.3d at 1070.

7 In short, Plaintiffs allege that they paid a premium for a feature they did not receive; that they  
 8 would not have paid that premium, or even purchased the Vehicles, but for Defendants’ fraud; and  
 9 that as a result, they overpaid for their Vehicles. Plaintiffs’ allegations are more than suffice to  
 10 establish Article III standing.

11 **B. The Clean Air Act does not preempt Plaintiffs’ state law claims.**

12 In moving to dismiss on preemption grounds, *see* VW Br. at 37-40, VW seeks immunity for  
 13 false promises that it voluntarily made to consumers and its concealment of material facts. Under  
 14 VW’s interpretation of the Clean Air Act (“CAA”), a manufacturer can promise consumers that its  
 15 vehicles are clean, low emitting, and EPA-compliant, and collect a premium for these purported  
 16 features. When these promises—which no regulator authorized or forced VW to make—are proved  
 17 to be false and misleading, the manufacturer cannot hide behind CAA preemption. No one forced  
 18 VW to lie about its emissions compliance and the CAA does not give VW immunity for its lies.

19 VW does not meet its burden on this affirmative defense.<sup>40</sup> As Judge Berg said in a hearing  
 20 on motions to dismiss in another similar defeat-device case, “[t]hat seems like fraud to me, it seems  
 21 like it’s a pretty bad misrepresentation if somebody is selling me something with a device in it that  
 22 hides what it’s really doing. That sounds crooked.” Transcript of Oct. 11, 2017 Hearing on Motions  
 23 to Dismiss, ECF No. 46 at 24, *Bledsoe v. FCA US LLC*, No. 16-cv-14024-TGB-RSW (E.D. Mich.).

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25 <sup>40</sup> Federal preemption is an affirmative defense for which the defendants bear the burden of  
 26 proof. “Dismissal under Rule 12(b)(6) on the basis of an affirmative defense is proper only if the  
 27 defendant shows some obvious bar to securing relief on the face of the complaint.” *ASARCO, LLC*  
 28 *v. Union Pac. R.R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014); *see also Sams v. Yahoo! Inc.*, 713 F.3d  
 1175, 1179 (9th Cir. 2013) (“the assertion of an affirmative defense may be considered properly on a  
 motion to dismiss where the ‘allegations in the complaint suffice to establish’ the defense”) (quoting  
*Jones v. Bock*, 549 U.S. 199, 215 (2007)).

1 Despite its alleged fraud, VW effectively contends that Plaintiffs lack *any* means to obtain  
 2 compensation by admitting that “[t]here is no private right of action for compensatory damages  
 3 under the CAA.” VW Br. at 9. As shown below, VW is wrong.

4 **1. Plaintiffs’ state law claims are not expressly preempted.**

5 VW first erroneously contends that the CAA expressly preempts Plaintiffs’ state-law claims.  
 6 VW Br. at 37-39. Section 209 of the CAA provides that “[n]o State or any political subdivision  
 7 thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new  
 8 motor vehicles.” 42 U.S.C. § 7543(a). VW ignores the words “[n]o State or any political subdivision  
 9 shall . . . attempt to enforce any standard” throughout its brief, asking whether Plaintiffs’ claims are  
 10 preempted “because each claim relates to emissions standards for new motor vehicles.” VW Br.  
 11 at 3.<sup>41</sup> But the CAA does *not* preempt claims that merely relate to the control of emissions from new  
 12 motor vehicles. It preempts claims only if *a State or one of its subdivisions* “adopts or attempts to  
 13 enforce any standard” relating to the control of emissions from new motor vehicles. Moreover, the  
 14 CAA recognizes the distinction between state bodies and private individuals, providing that  
 15 “Nothing in this section shall restrict any right which *any person (or class of persons)* may have  
 16 under *any statute or common law* to seek enforcement of any emission standard or limitation *or to*  
 17 *seek any other relief.*” 42 U.S.C. § 7604(e) (emphasis added).<sup>42</sup> Here, Plaintiffs are private  
 18 individuals seeking relief under state laws—not a state body trying to enforce emission-control  
 19 standards; thus, Section 209 does not apply to Plaintiffs’ claims.

20 Ignoring the fact that Section 209 categorically does not apply to Plaintiffs’ claims as private  
 21 individuals, VW proceeds to misleadingly contend that the “words ‘relating to’ are indicative of a  
 22 broad preemptive purpose.” VW Br. at 38 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S.  
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 25 <sup>41</sup> Similarly, Volkswagen misleadingly asserts that Plaintiffs’ claims are preempted because  
 26 “each claim ‘relat[es] to the control of emissions from new motor vehicles.’ 42 U.S.C. § 7543(a).”  
 27 VW Br. at 7. *See id.* (“Because the Pre-NOV Plaintiffs’ claims relate to motor vehicle emission  
 28 standards, their claims are field-preempted....”).

<sup>42</sup> In addition, the Senate explained that this “specifically preserve[s] any rights or remedies  
 under any other law. So if damages could be shown, other remedies would remain available.” S. Rep.  
 No. 91-1196, at 38 (1970). In other words, Congress had a “clear and manifest” intent *not* to preempt  
 the private state law causes of action alleged here.

1 374, 383 (1992)). But VW can only argue this by reading the word “standard” out of the language of  
 2 Section 209. That is not how courts construe the CAA. In *Engine Mfrs. Ass’n v. S. Coast Air Quality*  
 3 *Mgmt. Dist. (“South Coast”)*, 541 U.S. 246 (2004), the Court ruled that the term “standard”  
 4 contemplates “numerical” limits on emissions or equipment and design requirements related to  
 5 emissions control, *id.* at 253, or a “command, accompanied by sanctions, that certain purchasers may  
 6 buy only vehicles with particular emission characteristics,” *id.* at 255. As this Court explained in  
 7 dismissing claims by the *State* of Wyoming against VW, the purpose of Section 209 is not to  
 8 preempt any claim “relating to” emissions standards, but to “avoid the ‘anarchic patchwork of  
 9 federal and state regulatory programs’ that could otherwise result if each State were free to adopt or  
 10 enforce new motor vehicle emission standards.” *In re Volkswagen “Clean Diesel” Mktg., Sales*  
 11 *Practices, & Prods. Liab. Litig.*, 264 F. Supp. 3d 1040, 1050 (N.D. Cal. 2017) (“*Wyoming Order*”)  
 12 (quoting *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996)).<sup>43</sup>

13 Thus, VW’s reliance on *Morales* is misplaced. In *Morales*, the Supreme Court held that the  
 14 Airline Deregulation Act preempted “state regulation of fare advertisements,” because “state  
 15 restrictions on fare advertising have the forbidden significant effect upon fares.” 504 U.S. at 380,  
 16 388. Here, in contrast, Plaintiffs’ claim for deceptive conduct cannot have *any* effect on emissions  
 17 standards. Plaintiffs simply do not seek any ruling that would set any standard for emissions.

18 Similarly, in *Jensen Family Farms, Inc.*, 644 F.3d at 936, the Ninth Circuit distinguished  
 19 *Morales* in holding that the CAA did not preempt the Monterey pollution control district from  
 20 “enforcing rules that regulate diesel-powered engines.” The court explained that “there is little  
 21 similarity between the examples laid out in *South Coast* and the registration and fee regime  
 22 established by [the rules at issue in *Jensen*, which] do not require that a vehicle or engine emit below  
 23 a certain level of a given pollutant. . . . [but] simply require owners to register and pay fees for

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25 <sup>43</sup> This Court cited the same two examples of standards set forth in *South Coast*. As to numerical  
 26 limits on emissions, this Court stated that the “first example is a ‘regulation requiring that vehicles or  
 27 engines not emit more than a certain amount of a given pollutant.’” *Wyoming Order*, 264 F. Supp. 3d  
 28 at 1050 (citation omitted). As to a command that vehicles have particular emissions characteristics,  
 this Court stated that the “second [example] is a ‘requirement[ ] that a vehicle or engine be equipped  
 with a certain type of pollution-control device, or that a vehicle or engine include some other design  
 feature relating to emissions control.’” *Id.* (citation omitted).

1 certain kinds of diesel engines.” *Id.* at 940. The court in *Jensen* also rejected a broad reading of  
 2 “relating to,” because “[u]nder [that] logic, every rule promulgated by the District relating to nonroad  
 3 engines and vehicles would be preempted by § 209(e). Such a broad reading of the ‘relating to’  
 4 clause would render inconsequential the analysis contained in *South Coast*, which clarified the  
 5 breadth of the word ‘standard.’” *Id.* at 941. And the Court explained that *Morales* “left room . . . for  
 6 state actions that are ‘too tenuous, remote, or peripheral . . . to have pre-emptive effect.’” *Id.* (quoting  
 7 *Morales*, 504 U.S. at 390).

8 Consistent with *South Coast* and *Jensen*, Plaintiffs’ claims under consumer protection statutes  
 9 (¶¶ 519-871) do not adopt or attempt to enforce emissions control standards; rather, they rely on  
 10 duties not to deceive or fraudulently conceal, and allege harm from breaches of those duties. Courts  
 11 consistently hold that the CAA does not preempt such claims of deception. For example, in *Counts v.*  
 12 *GM, LLC*, 237 F. Supp. 3d 572 (E.D. Mich. 2017), the court held that the CAA did not preempt the  
 13 plaintiffs’ claims against GM for deceptively marketing vehicles that contained defeat devices. The  
 14 court explained that the claims “focus on ‘the deceit about compliance, rather than the need to  
 15 enforce compliance,’” and that the claims were “not, as GM contends, contingent on proving that  
 16 GM is in noncompliance with EPA emissions regulations.” *Id.* at 592. The court held that there could  
 17 be “no doubt that proving noncompliance would bolster Plaintiffs’ claims, but Plaintiffs need not  
 18 make that showing to prevail. Accordingly, Plaintiffs’ claims are not preempted by the CAA.” *Id.*  
 19 Similarly, the court in the *Virginia Clean Diesel Action* held that the CAA did not preempt consumer  
 20 fraud claims that “ultimately rest on and seek remediation of injuries arising from misrepresentations  
 21 and concealment of material facts made to (or hidden from) the Plaintiffs about the compliance,  
 22 efficiency, and technology of their vehicles.” 2016 WL 5347198, at \*5; *accord, In re Caterpillar,*  
 23 *Inc., C13 and C15 Engine Prods. Liab. Litig.*, 2015 WL 4591236, at \*13 n.17 (D.N.J. July 29, 2015)  
 24 (fraud claims not preempted because the “duty not to deceive as embodied by the various state  
 25 consumer protection laws upon which Plaintiffs rely has nothing to do with emissions control  
 26 systems”).<sup>44</sup> The same analysis applies to Plaintiffs’ claims here.

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 28 <sup>44</sup> See also *Altria Grp., Inc. v. Good*, 555 U.S. 70, 81 (2008) (consumer protection claims not  
 preempted by Federal Cigarette Labeling and Advertising Act because the duty imposed by state law

1           In a vain attempt to support its preemption argument, VW incorrectly asserts that each state-  
 2 law claim “rests on allegations that the Volkswagen Defendants violated EPA regulations under the  
 3 CAA that govern the vehicle emissions certification process.” VW Br. at 7. In fact, Plaintiffs’ state-  
 4 law claims rest on VW’s *misrepresentations*, not violations of EPA regulations. As this Court  
 5 explained in *Napleton*, the “scheme, as alleged, was to misrepresent to U.S. regulators and the public  
 6 that Volkswagen’s ‘clean diesel’ vehicles complied with U.S. emission standards and were  
 7 environmentally friendly.” 2017 WL 4890594, at \*13 (citing Second Amended Complaint at ¶¶ 408-  
 8 09).<sup>45</sup> Indeed, in *Napleton*, this Court did not refer *at all* to violations of EPA regulations, for the  
 9 simple reason that—like Plaintiffs’ claims here—the claims of the plaintiffs in that matter rest on  
 10 misrepresentations, not violations of regulations.

11           The cases cited by VW are inapposite. In *Jackson v. GMC*, 770 F. Supp. 2d 570 (S.D.N.Y.  
 12 2011), *aff’d sub nom.*, *Butnik v. GMC*, 472 F. App’x 80 (2d Cir. 2012), the plaintiffs based their  
 13 personal-injury claims for the ingestion of harmful diesel exhaust fumes directly on violations of the  
 14 CAA—not on any misrepresentation by the defendant—alleging that “the design of Defendants’  
 15 buses violated the emissions standards set out in the CAA”). In *Felix v. Volkswagen Grp. of Am., Inc.*,  
 16 the court distinguished *Jackson*, holding that the CAA did not preempt claims that “VW  
 17 misrepresented its vehicles’ high performance capabilities while asserting each vehicle fully  
 18 complied with federal emissions standards set by the Environmental Protection Agency.” 2017 WL  
 19 3013080, at \*1 (N.J. App. Div. July 17, 2017) (*per curiam*). The court explained, “we find *Jackson*,  
 20 which alleged direct violations of EPA standards as a predicate for claims of personal injuries, to be  
 21 entirely distinguishable,” *id.* at \*5, and explaining it would instead “follow the more persuasive  
 22 reasoning advanced by courts in two other cases”—*i.e.*, *Counts* and the *Virginia Clean Diesel Action*  
 23 decision. *Id.* at \*5-6.

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 27           “has nothing to do with smoking and health”); *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 444  
 28 (2005) (rules requiring manufacturers to honor express warranties or other contractual commitments  
 were not requirements for “labeling or packaging” and therefore not preempted).

29           <sup>45</sup> Plaintiffs’ allegations in paragraphs 473-74 of the Complaint in this action are identical to the  
 30 allegations in paragraphs 408-09 of the *Napleton* Second Amended Complaint.

1           VW also relies on this Court’s ruling in its *Wyoming Order*, but ignores the fact that the  
 2 plaintiff there was the State of Wyoming, not consumers. This Court explained that Wyoming was  
 3 effectively “seek[ing] to ‘enforce [a] standard relating to the control of emissions from new motor  
 4 vehicles,’” and that “[b]ecause the [CAA] prohibits States from enforcing such standards,  
 5 Wyoming’s claims cannot go forward.” 264 F. Supp. 3d at 1057 (quoting 42 U.S.C. § 7543(a)).  
 6 Distinguishing *Counts*, this Court noted that there the court had relied on “a distinction between  
 7 attempts to enforce EPA regulations (which are preempted) and attempts to hold GM liable for  
 8 misrepresentations it made to consumers about its vehicles’ emissions more generally (which the  
 9 court held were not preempted).” *Id.* at 1056. This Court explained that “Wyoming is not attempting  
 10 to hold Volkswagen liable for deceptive statements made to the State’s residents; the State is instead  
 11 attempting to hold Volkswagen liable for using a defeat device in its vehicles.” *Id.* Plaintiffs’ claims  
 12 here are like the claims in *Jensen*, *Counts*, the *Virginia Clean Diesel Action*, and *Felix*—not the  
 13 claims made by the State of Wyoming.

14           **2. Plaintiffs’ state claims are not impliedly preempted, because Congress did not  
 15 preempt the field of emissions regulation, and VW can comply with both federal and  
 state law.**

16           There is no merit to VW’s contention that Plaintiffs’ state law claims are impliedly  
 17 preempted. VW Br. at 39-40. As Judge Simandle noted in *Caterpillar*, “the [CAA] savings clause  
 18 suggests that Congress did not intend to occupy the entire field of motor vehicle regulation,” and that  
 19 instead it “explicitly contemplates continued state involvement in the regulation of motor vehicles.”  
 20 2015 WL 4591236, at \*14. Because Plaintiffs’ claims do not hinge on compliance with EPA  
 21 standards, there is no direct conflict with the federal regulatory scheme that requires compliance.  
 22 *Id.* at \*14-15; *see also Felix*, 2017 WL 3013080, at \*7 (same). It is possible for VW to both comply  
 23 with the EPAs requirements under the CAA and not to make omissions and misrepresentations about  
 24 having done so—a point VW does not dispute. For that reason, there is no merit to VW’s claim that  
 25 Plaintiffs’ state-law claims could result in jury decisions that would create “direct conflicts with the  
 26 determinations of the EPA and of sister states.” VW Br. at 39. VW does not and cannot cite any EPA  
 27  
 28

1 determination that would conflict with a jury finding that VW made omissions and  
 2 misrepresentations about the Vehicles and their compliance with emission regulations.

3 Finally, VW erroneously asserts that Plaintiffs' claims are "preempted because they seek to  
 4 impose remedies beyond those provided by federal law for the same conduct that the EPA is charged  
 5 with addressing." VW Br. at 39. But VW admits that "[t]here is no private right of action for  
 6 compensatory damages under the CAA." *Id.* at 9. And VW does not and cannot contend that the EPA  
 7 can award compensatory damages to Plaintiffs for VW's fraud. So under VW's view, Congress  
 8 intended to deprive Plaintiffs of *any* means of seeking compensation for fraud any time that fraud is  
 9 related in some way to emissions standards. But as the Supreme Court has stated in a similar context,  
 10 "[i]t is, to say the least, 'difficult to believe that Congress would, without comment, remove all  
 11 means of judicial recourse for those injured by illegal conduct,' and it would take language much  
 12 plainer than the text of § 360k to convince us that Congress intended that result." *Medtronic, Inc. v.*  
 13 *Lohr*, 518 U.S. 470, 487 (1996) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)).  
 14 Similarly, nothing in the CAA supports VW's argument that Congress, without comment, has  
 15 removed all judicial recourse for Plaintiffs' state-law claims.

16 **C. Plaintiffs adequately allege their state law claims.**

17 As the Ninth Circuit has explained, "In a Rule 12(b)(6) motion, the court evaluates the merits  
 18 of the claims by accepting all allegations in the complaint as true, viewing them in the light most  
 19 favorable to the plaintiffs, and determining whether they state a claim as a matter of law.... The  
 20 defendant bears the burden of showing that no claim has been presented." *Hedges v. United States*,  
 21 404 F.3d 744, 750 (9th Cir. 2005). VW has failed to meet its burden. Indeed, this Court should not  
 22 consider any of VW's arguments for dismissing Plaintiffs' state-law claims. VW makes only cursory  
 23 arguments, citing to an Appendix, Dkt. 4534-1, which lists cases with virtually no discussion. The  
 24 Court should refuse to consider that Appendix as flouting the page limits set by the Court for VW's  
 25 Motion.<sup>46</sup>

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26 <sup>46</sup> This Court routinely rejects attempts to exceed allowable page limits using appendices. *See*  
 27 *Jonna Corp. v. City of Sunnyvale, Cal.* 2017 WL 2617983, at \*2 (N.D. Cal. June 16, 2017) (striking  
 28 appendix "as argument in excess of the page limit"); *Todd v. Tempur-Sealy Int'l, Inc.*, 2016 WL  
 5746364, at \*4 n.3 (N.D. Cal. Sept. 30, 2016), *reconsideration denied*, 2017 WL 2833997 (N.D. Cal.

1 And in any event, VW's arguments are incorrect, for reasons set forth below.

2 **1. The Complaint adequately alleges damages, proximate causation, and reliance.**

3 VW has failed to meet its burden of articulating why Plaintiffs' Complaint fails to sufficiently  
 4 allege damages, proximate cause, or reliance. Indeed, with respect to damages and proximate cause,  
 5 VW's Motion fails to even identify which claims it asserts are insufficiently pled, save in vague  
 6 references to its Appendix.

7 The Complaint alleges (1) that VW marketed its "clean diesel" Vehicles on the basis of their  
 8 environmental performance,<sup>47</sup> (2) that VW charged a premium for their "clean diesel" Vehicles,<sup>48</sup> (3)  
 9 that Class members did not receive the "clean diesel" for which they paid a premium,<sup>49</sup> (4) that Class  
 10 members could not have recouped the premium they paid even if they re-sold their Vehicles,<sup>50</sup> (5)  
 11 that Plaintiffs and Class members relied on VW's misrepresentations, which were material to  
 12 consumers' decisions to purchase the Vehicles,<sup>51</sup> and (6) for each claim brought in the Complaint,  
 13 that Plaintiffs and Class members suffered damages as a direct and proximate result of Defendants'  
 14  
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17 June 30, 2017) (arguments in appendices were "an unsubtle vehicle for deliberately circumventing  
 18 the page limits," "violate[d] the Court's rules[,] and diminish[ed] the effectiveness of the parties'  
 19 advocacy"). Nevertheless, out of an abundance of caution, Plaintiffs have submitted a Responsive  
 20 Appendix in the same format as VW's Appendix, with specific responses to each of VW's  
 21 "arguments" (to the extent those arguments could be gleaned from the skeletal format of their  
 22 appendix).

23 <sup>47</sup> See, e.g., ¶¶ 12, 285, 289, 380; *supra*, n.9.

24 <sup>48</sup> See, e.g., ¶¶ 10, 379, 6, 230, 12, 380; *supra*, nn.10 & 11

25 <sup>49</sup> See, e.g., ¶¶ 380, 10, 12, 24, 27, 38, 51, 57, 62, 69, 72, 77, 81, 85, 94, 98, 103, 108, 113, 118,  
 26 124, 131, 141, 145, 149, 154; *supra*, n.12.

27 <sup>50</sup> See, e.g., ¶¶ 382, 13, 24, 27, 38, 51, 57, 62, 69, 72, 77, 81, 85, 94, 98, 103, 108, 113, 118, 124,  
 28 131, 141, 145, 149, 154; *supra*, n.20.

29 <sup>51</sup> See, e.g., ¶ 6 ("[c]onsumers believed Volkswagen and bought . . . 'clean' diesel vehicles in  
 30 record numbers"), ¶ 379 ("Plaintiffs and Class members bought or leased the Class Vehicles based  
 31 on [Defendants' claims, including claims of low emissions]"), ¶ 502 (" . . . Plaintiffs, along with tens  
 32 of thousands of other consumers, relied upon Defendants' representations and omissions . . ."); ¶ 568  
 33 (" . . . Plaintiffs and Class members relied on the misrepresentations and/or omissions of VW with  
 34 respect to the environmental and other performance of the Class Vehicles."); ¶¶ 502, 528, 545, 579,  
 35 599, 613 (facts misrepresented by VW were "material" to consumers' purchasing decisions, as well  
 36 as to government regulators).

1 conduct.<sup>52</sup> These allegations are more than sufficient to plead damages, proximate cause, and  
 2 reliance, and VW's gaunt arguments to the contrary do not establish otherwise.<sup>53</sup>

3 *First*, VW incorrectly argues that "the mere presence of an illegal feature in a product is  
 4 insufficient to constitute damages unless a plaintiff was actually injured." VW Br. at 41. Again, VW  
 5 ignores the Complaint's allegations that Plaintiffs were injured when they paid a premium for a  
 6 feature they did not receive, and when they purchased Vehicles that they would not have (and could  
 7 not have) purchased but for VW's fraud. *See supra* pp. 10 & 31-32. Nor do either of VW's cited  
 8 authorities suggest that allegations of this type of economic injury are somehow insufficient to  
 9 adequately plead damages.<sup>54</sup>

10 *Second*, VW erroneously contends that "Plaintiffs have not adequately pled any premium  
 11 related to NOx emissions, and even if they had, they would have recovered that amount when they  
 12 sold their vehicles." VW Br. at 41-42. As established above in the discussion on Article III standing,  
 13 VW's argument simply ignores the Complaint's allegations (1) that the clean-diesel premium is  
 14 directly linked to VW's promises about low emissions, *see supra*, Section IV.A.2.b at p. 21, and  
 15 ¶¶ 6, 25, 28, 33, 39, 379, 385, 302, 314; and (2) that Plaintiffs and Class members could not have

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 17 <sup>52</sup> *See, e.g.*, ¶ 507 (RICO), ¶ 518 (Magnuson-Moss), ¶¶ 533, 549, 560, 568, 581, 601, 618, 632  
 633, 651, 666, 683, 694, 710, 722, 740, 757, 773, 789, 805, 820, 838, 854, 870 (state law claims).

18 <sup>53</sup> Nor do any of VW's general authorities—citing the unremarkable propositions that pleading  
 19 damages is different from pleading standing, and that tort claims require a cognizable injury—  
 20 require this Court to find that Plaintiffs have inadequately pled damages. *See Krottner v. Starbucks*  
*Corp.*, 406 F. App'x 129 (9th Cir. 2010) (plaintiffs failed to state claim for negligence where alleged  
 21 injuries only "stem[med] from the danger of future harm" from potential misuse of stolen data);  
*Enslin v. Coca-Cola Co.*, 136 F. Supp. 3d 654 (E.D. Pa. 2015) (no discussion of damages; no  
 22 consumer protection or RICO claims); *Doe v. Chao*, 540 U.S. 614 (2004) (plaintiff did not allege any  
 23 actual damages, claiming only statutory damages); *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d  
 24 Cir. 2006) (no damages discussion; plaintiffs alleged sufficient injury to have Article III standing); *In*  
*re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002) (reversing district court's  
 25 decision to apply law of states where defendants were headquartered rather than laws of states where  
 product was purchased); *Bastian v. Petren Res. Corp.*, 892 F.2d 680 (7th Cir. 1990) (analyzing "loss  
 causation" in context of a securities fraud claim); *Shobert v. Ill. DOT*, 304 F.3d 725 (7th Cir. 2002)  
 (post-trial finding that challenged jury instruction imprecisely conflated "injury" and "damages," but  
 that no prejudice resulted).

26 <sup>54</sup> *See Hershenow v. Enter. Rent-A-Car Co. of Boston*, 840 N.E.2d 526, 534 (Mass. 2006) (illegal  
 27 term in rental car agreement was not alleged to have caused any economic or noneconomic loss);  
*Taragan v. Nissan N. Am., Inc.*, 2013 WL 3157918 (N.D. Cal. June 20, 2013) (injury was  
 28 "theoretical" where alleged defect had not actually manifested in any of plaintiffs' vehicles). *See also*, Responsive Appendix.

1 recouped the full premium they paid for the promised clean diesel performance, *see supra*, Section  
 2 IV.A.1.c, and, *e.g.*, ¶¶ 13, 382. Nor does VW's single cited authority establish otherwise as a matter  
 3 of law.<sup>55</sup>

4 *Third*, VW incorrectly argues, with respect to damages, that Plaintiffs have "failed to allege  
 5 that they have met the specific requirements of the relevant state statutes." VW Br. at 42. But VW  
 6 fails to identify any specific deficiency in Plaintiffs' allegations, save vague references to its  
 7 Appendix, along with references to Texas's requirements to receive "mental anguish" damages  
 8 (which Plaintiffs do not seek). *See id.* Instead, VW merely asserts the unremarkable proposition that  
 9 state laws may require damages beyond Article III injury, and that Plaintiffs' allegations do not  
 10 satisfy "these formulations" of damages (without any reference to what such formulations are). *Id.*  
 11 Plaintiffs complaint sufficiently states each of the state claims alleged, *see generally* ¶¶ 519-871.  
 12 VW's "vague assertions" to the contrary are impossible for Plaintiffs to cogently address and  
 13 therefore insufficient to meet VW's burden to articulate the deficiencies in the Complaint, *see*  
 14 *Strome v. DBMK Enters., Inc.*, 2014 WL 6485533, at \*8 (N.D. Cal. Nov. 19, 2014). Nor do VW's  
 15 cited authorities offer more clarity or support for its conclusory "argument."<sup>56</sup>

16 *Fourth*, VW erroneously argues that Plaintiffs fail to allege proximate cause, claiming that  
 17 Plaintiffs do not allege that their injuries "are a direct result of the defeat devices." VW Br. at 43. As  
 18 with its argument on Article III standing, VW misunderstands the relevant causal connection, which  
 19 is not the connection between the defeat device and Plaintiffs' injuries, but between VW's  
 20 *misrepresentations and material omissions* and Plaintiffs' injuries. The Complaint expressly alleges  
 21 that Plaintiffs and Class member would not (and indeed, could not) have purchased their Vehicles  
 22 but for VW's material misrepresentations and omissions—allegations that are sufficient to establish a

23  
 24 <sup>55</sup> *See Licul*, 2013 WL 6328734 (plaintiff never "suffer[ed] from the defect itself during [her  
 ownership of the vehicle]," and didn't allege that she had paid a premium). *See also* Responsive  
 25 Appendix.

26 <sup>56</sup> *See Bennett v. Grant*, 525 S.W.3d 642, 648 (Tex. 2017) (addressing requirements for "mental  
 27 anguish" damages not sought here); *Galecka v. Savage Arms, Inc.*, 2014 WL 2931859 (Mich. Ct.  
 App. June 26, 2014) (plaintiff failed to allege that he received anything less than what he expected  
 28 to receive from transaction); *Frye v. L'Oreal USA, Inc.*, 583 F. Supp. 2d 954, 958 (N.D. Ill. 2008)  
 ("no allegation that the presence of lead in the lipstick had *any* observable economic consequences")  
 (emphasis added); *see also* Responsive Appendix.

1 causal connection between VW's actions and Plaintiffs' injuries. In any case, Plaintiffs allege a  
 2 causal connection between low NOx emissions (and thus, the defeat device) and the clean-diesel  
 3 premium paid by Plaintiffs and Class members. *See supra*, Section IV.A.2.b at 21. None of VW's  
 4 cited authorities do anything other than suggest the general parameters of proximate cause. Indeed,  
 5 none of the cases—which involve everything from anti-terrorism claims to discussions of the link  
 6 between illegal immigrant hiring and county healthcare expenditures—are even remotely factually  
 7 analogous to the present case.<sup>57</sup> Much less do they establish, or even suggest, that Plaintiffs'  
 8 allegations here are insufficient to establish proximate causation.

9 *Finally*, VW erroneously argues that Plaintiffs fail to sufficiently allege reliance as required  
 10 under Arizona, California, New York, North Carolina, Pennsylvania, and Virginia law, because the  
 11 Complaint does not identify misrepresentations relied on personally by each individual Plaintiff. VW  
 12 Br. at 45. As with its other arguments, VW's reliance argument ignores the Complaint's explicit  
 13 allegations that Plaintiffs and Class members relied on VW's misrepresentations,<sup>58</sup> as well as  
 14 Plaintiffs' individual allegations that they purchased their Vehicles based on VW's "clean diesel"  
 15 promises and the Vehicles' reputations as environmentally friendly,<sup>59</sup> and that they "would not have  
 16 purchased" their Vehicles but for VW's concealment of its illegal cheat device.<sup>60</sup> None of the

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18       <sup>57</sup> *See Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008) (increase in county's  
 19 healthcare and criminal justice expenditures was too far removed from defendants' hiring of  
 20 undocumented immigrants to establish proximate cause under RICO); *Rothstein v. UBS AG*, 708  
 21 F.3d 82 (2nd Cir. 2013) (no proximate cause alleged for Anti-Terrorism Act claim, where no  
 22 allegations that moneys transferred by bank to Iran were used to fund particular terrorist attacks that  
 23 harmed plaintiffs); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014)  
 24 (finding proximate cause for Lanham Act claim despite the fact that plaintiff was an indirect victim  
 25 of defendant's conduct); *Lorenzo v. Qualcomm Inc.*, 2009 WL 2448375 (S.D. Cal. Aug. 10, 2009)  
 26 (no proximate cause where there were at least three intermediaries between defendants' antitrust  
 27 violations and plaintiff's injury, and plaintiff failed to allege any facts supporting a causal link); *City  
 28 of New York v. Smokes-Spirits.Com, Inc.*, 911 N.E. 2d 834 (N.Y. 2009) (city's lost tax revenue not  
 29 proximately caused by defendants' illegal marketing and shipping of cigarettes over the internet, but  
 30 was only derivative of consumer claims).

31       <sup>58</sup> *See supra*, n.51.

32       <sup>59</sup> ¶ 25 (Plaintiff Kahlert), 28 (Angela Matt Architect), 33 (Field), 39 (Dreher), 45 & 125  
 33 (Schell), 52 (Sheffield), 58 (Lecours), 70 (Skena), 73 (St. Croix), 78 (Olson), 82 (Kubala), 86 (Daly),  
 34 99 (Gallucio), 104 (Rawczak), 114 (Hofmann), 119 (Siehl), 132 (Conner).

35       <sup>60</sup> ¶ 20 (Plaintiff Nemet), 25 (Kahlert), 28 (Angela Matt Architect), 33 (Field), 40 (Dreher), 45  
 36 & 125 (Schell), 52 (Sheffield), 58 (Lecours), 63 (De La Cruz), 66 (Winebaugh), 70 (Skena), 73 (St.

1 authority cited by VW requires a finding that these allegations are insufficient to show reliance.<sup>61</sup>  
 2 Nor does VW cite any authority for the proposition that the listed states' consumer protection  
 3 statutes require allegations of specific misrepresentations relied on by each individual Plaintiff,  
 4 particularly in a context—as alleged in the Complaint—of pervasive, market-wide fraud relied on not  
 5 only by consumers, but by regulators certifying the Vehicles as legally saleable. Indeed, courts have  
 6 held that such individualized reliance allegations are unnecessary in similar contexts under Arizona,  
 7 California, New York, North Carolina, Pennsylvania, and Virginia law. *See, e.g., Siemer v. Assocs.*  
 8 *First Capital Corp.*, 2001 WL 35948712, at \*4 (D. Ariz. Mar. 30, 2001) (class-wide reliance under  
 9 Arizona Consumer Fraud Act shown by purchasing misrepresented product); *Daniel v. Ford Motor*  
 10 *Co.*, 806 F.3d at 1225 (under California UCL & CLRA, plaintiff need only prove that omission “was  
 11 a substantial factor in his decision,” which may be done “by simply proving that, had the omitted  
 12 information been disclosed, one would have been aware of it and behaved differently”); *Pulaski &*  
 13 *Middleman, LLC v. Google, Inc.*, 802 F.3d at 985 (stating a claim under California UCL or FAL  
 14 requires only a showing “that members of the public are likely to be deceived,” and “does not require  
 15 individualized proof of deception, reliance, and injury”); *Brown v. Hain Celestial Grp., Inc.*, 2015  
 16 WL 3398415, at \*11 (N.D. Cal. May 26, 2015) (under CLRA, classwide reliance can be inferred  
 17 from material misrepresentations); *Guido v. L’Oreal, USA, Inc.*, 2013 WL 3353857, at \*12 (C.D.

18  
 19 Croix), 78 (Olson), 82 (Kubala), 86 (Daly), 95 (Ferdinand), 99 (Galluccio), 104 (Rawczak), 109  
 (Miller), 119 (Siehl), 132 (Conner), 142 (Salgado), 146 (Bowman), 150 (Mosley).

20       <sup>61</sup> VW cites a handful of cases in its Appendix—which this Court should ignore, as argued *supra*  
 21 n.46—but none stand for the proposition that Plaintiffs must allege individualized reliance. *See*  
 22 *Responsive Appendix*. In fact, VW plainly misrepresents the law. *See Todd v. Tempur-Sealy*, 2016  
 23 WL 5746364, at \*6-7 (“Defendants first contend that four states – California, Maryland,  
 24 Washington, and Wisconsin – require proof of individualized reliance rather than a general showing  
 25 that an objective consumer would be misled. ECF No. 220 at 27. In their brief, they neither offer  
 26 analysis on this point nor engage with Plaintiffs’ cited authority, but instead direct the Court to an  
 27 appendix, which lists cases that Defendants assert support their arguments. [¶] Having reviewed the  
 28 competing law offered by both parties, the Court concludes Defendants have misrepresented the law  
 of all four states. With regard to California, this Court has previously held that for false  
 misrepresentation claims, ‘an inference of common reliance arises if representations are material, and  
 materiality is judged by an objective standard rather than any understandings specific to the  
 individual consumer.’ *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 242 (N.D. Cal. 2014). The Ninth  
 Circuit has reached the same conclusion. *See, e.g., Stearns v. Ticketmaster Corp.*, 655 F.3d 1013,  
 1020 (9th Cir. 2011) (The change in California law “decidedly did not change the California rule that  
 relief under the UCL is available without individualized proof of deception, reliance and injury.”  
 (citation omitted)).

1 Cal. July 1, 2013) (for purposes of a false advertising claim “under New York law, there is a  
 2 presumption of reliance when the defendant controls the relevant information and a consumer of  
 3 ordinary intelligence could not discover the true state of affairs”) (citing *Leider v. Ralfe*, 387 F. Supp.  
 4 2d 283, 293, 296 (S.D.N.Y.2005)); *Cullen v. Valley Forge Life Ins. Co.*, 161 N.C. App. 570, 580  
 5 (2003) (actual reliance is not a required element for a North Carolina UDTPA claim);<sup>62</sup> *Corson v.*  
 6 *Toyota Motor Sales, U.S.A., Inc.*, 2013 WL 1802709, at \*8 (C.D. Cal. Apr. 24, 2013) (under  
 7 Pennsylvania UTPCPL, “[w]hen one would not have entered the transaction in the presence of full  
 8 disclosure of a material fact . . . that person has obviously relied”); thus, plaintiffs alleged reliance  
 9 where they alleged that “had they known of the defective nature of the Vehicles, they would not have  
 10 purchased the Vehicles, or would have paid less for them” (quoting *Peerless Wall & Window*  
 11 *Coverings, Inc. v. Synchronics, Inc.*, 85 F. Supp. 2d 519, 534 (W.D. Pa. 2000)); *Levine v. First Am.*  
 12 *Title Ins. Co.*, 682 F. Supp. 2d 442, 467 (E.D. Pa. 2010) (plaintiffs sufficiently alleged reliance for  
 13 Pennsylvania UTPCPL claim where they alleged that no plaintiff “would have knowingly paid a  
 14 premium for title insurance that was higher than the premium that was actually due and owing”);  
 15 *McCabe v. Daimler AG*, 948 F. Supp. 2d 1347, 1370 (N.D. Ga. 2013) (Virginia plaintiff plausibly  
 16 alleged justifiable reliance where allegations suggested defendants willfully concealed a material  
 17 fact, and plaintiff alleged “he expected to receive vehicles free from design or manufacturing defects  
 18 and that he would not have purchased his vehicles had he known of the defect.”); *Virginia Clean*  
 19 *Diesel Action*, 2016 WL 5347198, at \*8 (plaintiffs sufficiently pled fraud by both misrepresentation  
 20 and concealment where “complaints contain[ed] statements by Volkswagen CEO . . . acknowledging  
 21 concealment of the existence of the ‘defeat device’ software” and plaintiff alleged “reliance on the  
 22 environmental claims made by VWGA”).

23 Plaintiffs have sufficiently alleged damages, proximate cause, and reliance, and VW’s  
 24 Motion fails to meet its burden to establish otherwise.

25  
 26       <sup>62</sup> Additionally, North Carolina courts have held that allegations of reasonable reliance are  
 27 unnecessary where a claim is based on a failure to disclose a material fact—as Plaintiffs allege here.  
 28 *See Everts v. Parkinson*, 147 N.C. App. 315, 325-26 (2001); ¶¶ 502, 528, 545, 579, 599, 613 (facts  
 misrepresented and omitted by VW were “material” to consumers’ purchasing decisions, as well as  
 to government regulators).

1                   **2. None of Plaintiffs' state law claims have any other deficiencies.**

2                   **a. None of Plaintiffs' claims are time-barred.**

3                   VW erroneously contends that Plaintiffs' claims under the Arizona Consumer Fraud Act and  
 4                   the Oregon Unlawful Trade Practices Act are time-barred. VW Br. at 43. VW ignores paragraph 391  
 5                   of the Complaint, which is entitled "American Pipe Tolling" and alleges that

6                   Plaintiffs and Class members here have tolling of any statutes of  
 7                   limitation by virtue of [their] being named as class members in some of  
 8                   the original complaints. *See, e.g., Levin v. Volkswagen Group of*  
*America, Inc., 3:15cv05638.* However, they were not included in the  
 9                   class definition of the 2.0-liter and 3.0-liter settlements, and they have  
 10                  never had a request for class certification denied.

11                  As a result, the limitations period was already tolled when NOV disclosures were made in 2015. *See*  
 12                  *Resh v. China Agritech, Inc., 857 F.3d at 1004* ("We conclude, based on *American Pipe and Crown,*  
 13                  *Cork & Seal*, read in the light of *Shady Grove, Smith and Tyson Foods*, that permitting future class  
 14                  action named plaintiffs, who were unnamed class members in previously uncertified classes, to avail  
 15                  themselves of *American Pipe* tolling would advance the policy objectives that led the Supreme Court  
 16                  to permit tolling in the first place.").

17                   **b. None of Plaintiffs' class-action claims are barred by state law barring class**  
 18                   **actions.**

19                  VW incorrectly contends that this Court should apply Mississippi's bar on class actions. VW  
 20                  Br. at 44. That argument is premature, because the viability of Plaintiffs' class action allegation is  
 21                  not at issue at this stage of the pleadings. But in any event, VW's argument is incorrect under *Shady*  
*Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393* (2010), in which the Supreme  
 22                  Court rejected the defendant's argument that because New York law prohibits class actions in suits  
 23                  seeking penalties or statutory damages, district courts may not certify a class under Rule 23.

24                  VW relies on only one case, *Tait v. BSH Home Appliances Corp.*, 2011 WL 1832941 (C.D.  
 25                  Cal. May 12, 2011), which takes a very narrow reading of *Shady Grove* by applying the reasoning of  
 26                  Justice Steven's concurrence. But as the court explained in *In re Lithium Ion Batteries Antitrust*  
*Litig.*, "Justice Stevens's concurrence in the Supreme Court's fractured decision in [*Shady Grove*] is  
 27                  not the controlling opinion of that case because it cannot be meaningfully regarded as both narrower

1 than another and a common denominator of the Court’s reasoning.” 2014 WL 4955377, at \*20 n.20  
 2 (N.D. Cal. Oct. 2, 2014) (citing *Lair v. Bullock*, 697 F.3d 1200, 1205 (9th Cir. 2012)); *accord*,  
 3 *Andren v. Alere, Inc.*, 2017 WL 6509550, at \*21 (S.D. Cal. Dec. 20, 2017); *In re Hydroxycut Mktg.*  
 4 & Sales Prac. Litig.

5 , 299 F.R.D. 648, 652-53 & n.2 (S.D. Cal. 2014) (explaining flaw in *Tait* court’s  
 reliance on Justice Stevens’ concurring opinion).

6 The flaw in relying on Justice Steven’s concurring opinion is also explained by the Eleventh  
 7 Circuit in *Lisk v. Lumber One Wood Preserving, LLC*, 792 F.3d 1331, 1335 (11th Cir. 2015), which  
 8 noted that “of critical importance here, all five justices agreed that applying Rule 23 to allow a class  
 9 action for a statutory penalty created by New York law did not abridge, enlarge, or modify a  
 10 substantive right; Rule 23 controlled. Regardless of which *Shady Grove* opinion is binding, the  
 11 holding is binding. On this there can be no dispute.” So the “holding controls our case. There is no  
 12 relevant, meaningful distinction between a statutorily created penalty of the kind at issue in *Shady*  
 13 *Grove*, on the one hand, and a statutorily created claim for deceptive practices of the kind at issue  
 14 here, on the other hand.” *Id.* Thus, state “statute[s] restricting class actions, like the New York statute  
 15 at issue in *Shady Grove*, do[] not apply in federal court. Rule 23 controls.” *Id.* at 1336.

16 VW also erroneously argues that this Court should dismiss Plaintiffs’ claim under the Utah  
 17 Consumer Sales Practices Act to the extent it seeks statutory damages for class members in addition  
 18 to actual damages. To begin with, that argument is procedurally flawed, because it provides no basis  
 19 for dismissal. But in any event, that argument directly contradicts the Supreme Court’s holding in  
 20 *Shady Grove*, in which Allstate argued that permitting a class action to proceed was not substantively  
 21 neutral, because it “‘transform[s] [the] dispute over a five hundred dollar penalty into a dispute over  
 22 a five million dollar penalty.’” 559 U.S. at 408. The Court did not agree:

23 Allstate’s aggregate liability . . . does not depend on whether the suit  
 24 proceeds as a class action. Each of the 1,000-plus members of the  
 25 putative class could (as Allstate acknowledges) bring a freestanding  
 26 suit asserting his individual claim. It is undoubtedly true that some  
 plaintiffs who would not bring individual suits for the relatively small  
 sums involved will choose to join a class action. That has no bearing,  
 however, on Allstate’s or the plaintiffs’ legal rights.

27 *Id.* The same reasoning applies here. Each member of the putative Utah class could bring an  
 28 individual suit for statutory damages, so just as in *Shady Grove*, VW’s aggregate liability does not

depend on whether the suit proceeds as a class action.

- c. Claims under Mississippi and Texas law should not be dismissed based on pre-suit requirements.

VW erroneously contends that Plaintiffs' claim under the Mississippi Consumer Protection Act should be dismissed for failure to engage in informal dispute resolution. VW Br. at 44 (citing Miss. Code Ann. § 75-24015(2)). The informal dispute resolution requirement is not enforceable in a federal-court class action, because it is plainly procedural, not substantive. Under *Shady Grove*, such a bar to a class action in federal court cannot be enforced because it does not abridge, enlarge, or modify a substantive right. If a bar on class actions altogether is unenforceable in federal court, then so too is a requirement of informal dispute resolution before filing such an action. Federal courts have their own dispute resolution procedures, which take place *after* the class action is filed.

VW also incorrectly argues in a footnote that Plaintiffs' Texas Deceptive Trade Practices and Consumer Protection Act claim should be dismissed for failure to give 60-day notice before filing suit. VW Br. at 44 n.41. VW ignores section 17.505(b) of that Act, which states, "If the giving of 60 days' written notice is rendered impracticable by reason of the necessity of filing suit in order to prevent the expiration of the statute of limitations or if the consumer's claim is asserted by way of counterclaim, the notice provided for in Subsection (a) of this section is not required . . ." The limitations period is two years, *see Tex. Bus. & Com. Code § 17.505(b)*, and VW argues that Plaintiffs "became aware of their claims as of the September 18, 2015 and November 2, 2015 NOV disclosures," VW Br. at 43, Thus, filing the Complaint on August 2, 2017, was necessary to prevent any argument that the two-year limitations period had expired. And even if 60-day notice were required, the remedy is a 60-day abatement, not dismissal. *See Oppenheimer v. Prudential Sec. Inc.*, 94 F.3d 189, 194 (5th Cir. 1996) ("the proper remedy for insufficient notice is abatement not dismissal"). But VW has filed a motion to dismiss, not abate, so its argument is moot.

d. Plaintiffs have statutory standing under Ohio law.

VW seeks dismissal of Plaintiffs' claim under the Ohio Deceptive Trade Practices Act ("ODTPA"). VW Br. at 4. Although courts are split as to whether consumers have standing to sue under that Act, the better-reasoned decisions hold that the Ohio Supreme Court would decide that

1 consumers have standing. In *Schumacher v. State Auto. Mut. Ins. Co.*, the court held that consumers  
 2 have standing to sue under the ODTPA, which “states in relevant part, ‘A person who is injured by a  
 3 person who commits a deceptive trade practice . . . may commence a civil action . . . .’” 47 F. Supp.  
 4 3d 618, 630 (S.D. Ohio 2014) (quoting Ohio Rev. Code § 4165.03(A)(2)) (emphasis by the court).”  
 5 The court further stressed that a “person” is defined to include ‘an *individual*.’” *Id.* (quoting Ohio  
 6 Rev. Code § 4165.01(D)) (emphasis by the court), concluding that consumers have standing to sue:

7 The limited number of Ohio lower courts to have considered this issue  
 8 immediately jump to a comparison of the ODTPA with the Lanham  
 9 Act without first considering the *actual language* of the ODTPA. That  
 10 language plainly provides that a “person” may “commence a civil  
 11 action” against another “person” who has committed a “deceptive trade  
 12 practice[,]” and included within the statutory definition of “person” is  
 13 an “individual” along with a litany of legal or commercial entities, with  
 14 the catch-all phrase “or any other legal or commercial entity [ ]” at the  
 15 end. *See* Ohio Rev. Code §§ 4165.01(D), 4165.03(A)(2).

16 *Id.* at 632; *accord, Bower v. IBM, Inc.*, 495 F. Supp. 2d 837, 842-44 (S.D. Ohio 2007). Thus, there is  
 17 no merit to VW’s argument that the Ohio Plaintiffs lack standing under the ODTPA.

## 18 V. CONCLUSION

19 VW’s motion to dismiss should be denied in its entirety, except that Plaintiffs agree to  
 20 dismissal of their claim under the Magnuson-Moss Warranty Act.

1 DATED: February 2, 2018

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on February 2, 2018, I electronically transmitted the foregoing document to the Court Clerk using the ECF System for filing. The Clerk of the Court will transmit a Notice of Electronic Filing to all ECF registrants.

/s/ Steve W. Berman

STEVE W. BERMAN